Docket: 2002-3102(EI)

BETWEEN:

1391288 ONTARIO LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of *1391288 Ontario Limited* (2002-3104(CPP)) on June 18, 2003 at Toronto, Ontario

Before: The Honourable W.E. MacLatchy, Deputy Judge

Appearances:

Counsel for the Appellant: John Kutkevicius

Counsel for the Respondent: Lorraine Edinboro

JUDGMENT

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

Signed at Toronto, Ontario, this 22nd day of July 2003.

"W.E. MacLatchy"

MacLatchy, D.J.

Citation: 2003TCC492
Date: 20030722
Dockets: 2002-3102(EI)
2002-3104(CPP)

BETWEEN:

1391288 ONTARIO LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

MacLatchy, D.J.

[1] These appeals were heard on common evidence, on consent, at Toronto, Ontario on June 18, 2003.

[2] The Appellant appealed a ruling to the Minister of National Revenue (the "Minister") for the determination of the question whether or not Cynthia McPhee (the "Worker") was employed in insurable and pensionable employment while engaged by it during the period April 1 to June 1, 2001 within the meaning of the *Employment Insurance Act* (the "*Act*") and the *Canada Pension Plan* (the "*Plan*") respectively.

[3] By letter dated February 20, 2002 the Minister informed the Worker and the Appellant that it had been determined that the Worker was employed in both insurable and pensionable employment during the period in question, pursuant to paragraph 5(1)(*a*) of the *Act* and paragraph 6(1)(*a*) of the *Plan* respectively.

[4] In making his decision, the Minister relied on the following assumptions of facts that were not disputed by the Appellant:

(a) the Appellant's business operation is to publish a weekly magazine that offers advertisement space for sale of used cars from dealers and private owners in the Peterborough area;

(b) the Worker's duties were to format ad pages based on automobile pictures and written descriptions provided by the Appellant's sales persons on a weekly basis;

(c) the worker performed her duties at an office provided by the Appellant, located next door to the Appellant's place of business;

(d) the Worker's rate of pay was $10 per page with a minimum of $250 and the magazine had 24 to 32 pages depending on the volume of business received by the Appellant for that week;

(e) the Worker's rate of pay was set by the Appellant and determined by the standard in this very competitive business, the rate being acceptable by the Worker;

(f) the Worker was paid by cheque on a weekly basis;

(g) the Worker could set her own hours each week to perform her duties provided a Thursday night deadline was complied with as required by the printer;

[5] The Worker and the Appellant agreed that there was little, if any, supervision of the Worker's performance. The Worker received the necessary information and photography from a salesman from which she prepared the design graphics for the customer. The salesman reviewed the advertisement as prepared by the Worker then presented it (by fax) to the customer for final approval. Subsequently, the Worker prepared the final laser print that was sent to the publisher for printing. The Worker used the computer software program and other minor items supplied by the Appellant at an office next door to the Appellant's premises. She could have performed her services elsewhere but it was more convenient for contact with the salesmen and others that the Worker would have to deal with during her working hours. She usually did not work until the Tuesday each week as the salesmen would not have sufficient work for her until then. The Worker was given a key to the premises to allow her access at anytime but the building was usually open from 7 a.m. each day.

[6] The question to be answered by this Court is whether the Worker was engaged pursuant to a contract for services and was an independent contractor or whether she was engaged as an employee pursuant to a contract of service.

[7] In the first instance it is necessary to apply the test as set forth by the Federal Court of Appeal in *Wiebe Door Services Ltd. v. M.N.R.*, 87 DTC 5025, to the facts presented and give each test an appropriate weight to attempt to determine the overall relationship that existed between the Appellant and the Worker.

[8] Control – This generally described the control that a master has over its servant. If clear control can be established, it is a very valuable test.

[9] In these circumstances, the Appellant appeared to have little, if any, control over the Worker. The Worker could set her own hours of the day or week so long as a deadline of Thursday evening was met. This deadline was not set by the Appellant but by the outside publisher; it was a fact of life in the industry. The Worker could come and go as she wished.

[10] The Worker was not supervised by the Appellant. Her work was approved by the salesmen for the Appellant but ultimately approved by the customer. If changes were required, it was the customer who would make the changes, not the Appellant.

[11] The rate of payment to the Worker was that commensurate to others in the industry. The business was described as being very competitive and the rate of pay equal to others in that business.

[12] No training was given to the Worker by the Appellant as she was trained in College in the graphic design field. There may have been about one hour given to the Worker to explain retrieval of photos from the salesmen's camera equipment. This would have been necessary for any person to learn the exigencies of the equipment used by the Appellant. Equipment varies with the manufacturer. There was no training required by the Worker to learn how to perform her function in the overall operation of this business.

[13] Although the question never arose, the parties seemed to agree that the Worker could have substituted anyone else to perform her services so long as that person had the necessary skill and expertise to do the work. The Worker gave evidence that she took a week off during the period in question but ensured that one of the principals in the business would perform her services in her absence.

[14] The evidence presented showed little control was ever exercised by the Appellant and further that there was little ability to control in the hands of the Appellant. This test would seem to indicate the existence of the Worker as an independent contractor.

[15] Tools – This test, in this day and age of sophisticated electronic equipment, does not seem to be of much value. The Worker used an office in a building next to that of the Appellant because it was a convenient location to interact with the salesmen who provided the information and photo material required by the Worker. The Appellant had the computer and software program that the Worker used in her graphic design preparation. She stated she could have used her own computer and by installing the software required, she could have performed her work at her own establishment. Convenience prevailed. Contact with the customers of the business was more easily made at the office. Little weight should be given to this test.

[16] Profit – The Worker stated she had her own business. The flexible hours enabled her to come and go as she pleased. She stated she could have other clients and perform services for others if she felt she wanted to increase her income. She was not reimbursed for any of her expenses whatever they might be. It was her business and she ran it as she pleased. The only requirement was the above referred to deadline for publication.

[17] Loss – This is a difficult test to apply from the point of view of the Worker. She had some expenses and if they were not curtailed she would suffer a loss. She received no health or life insurance benefits and was her own insurer. This could result in a severe loss in income should she suffer ill health. There was no vacation benefits available to her as there would have been had she been an employee.

[18] There were no deductions of any kind taken from her income and it was her responsibility to prepare her income and expense statements herself. This required time and effort away from her business to perform this function.

[19] These tests appear to support the existence of a contract for services between the Appellant and the Worker.

[20] The parties themselves set the conditions that established their relationship. A contract was entered into between them, as their relationship developed, a copy of which was entered as Exhibit A-1. The contract clearly stated that the agreement

established that the Worker was to be an independent contractor. All terms contained in the contract clearly supported the parties' intention to establish the independent contractor and principal relationship.

[21] The law referred to by counsel clearly supported the proposition that absent clear evidence of a "sham" attempt, the Court nor the Minister should "rewrite the contract entered into between the parties".

[22] The Court in *Saskatchewan Deaf & Hard of Hearing Services Inc. v. Minister of National Revenue*, [2001] T.C.J. No. 38, the Court stated in paragraph 29 of the decision:

> It was quite clear that the law requires the Court to look at the substance of the arrangement between the parties and not just the title. If the substance of the arrangement is not in accord with the label put upon it by the parties, it is the substance which must prevail. However, where the parties have clearly indicated to each other the nature of the contract they wish to enter into and there is no compelling evidence leading to a contrary conclusion, I am of the view that the Court should give due deference to the initial intention of the parties. It is not for the Court or for the Minister to rewrite the contract entered into by the parties, absent clear evidence of the substance differs from the stated intention.

[23] I am of the view that the Court should give due deference to the initial intention of the parties. It is not for the Court or for the Minister to rewrite the contract entered into by the parties, absent clear evidence of the substance differs from the stated intention.

[24] References were made to the decisions in an attempt to indicate the "modern approach" to taxation statutes. In the *Sara Consulting & Promotions Inc. v. Minister of National Revenue*, [2001] T.C.J. No. 773, decision, paragraphs 57 to 61 are of great assistance and should be quoted accordingly:

> Counsel then devoted some time to the "modern approach" to taxation statutes, quoting from *Antosko v. Minister of National Revenue* (1994), 94 D.T.C. 6314 (S.C.C.), at 6320:
>
> > ...In the absence of evidence that the transaction was a sham or an abuse of the provisions of the Act, it is not the role of the court to determine whether the transaction in question is one which renders the taxpayer deserving of a deduction. If the terms of

> the section are met, the taxpayer may rely on it, and it is the option of Parliament specifically to preclude further reliance in such situations.

He then quoted from the Supreme Court of Canada's decision in *Continental Bank of Canada v. R.* (1998), 98 D.T.C. 6505 (S.C.C.) with respect to whether an otherwise validly constituted partnership ought to be denied a tax advantage given that the partnership was expressly created to gain that advantage. The majority of the Court held at page 6518 that:

> ...The underlying premise of this reasoning is also that a transaction that is motivated by the securing of tax benefits is not a valid transaction. This reasoning cannot be supported.
>
> A taxpayer who fully complies with the provisions of the *Income Tax Act* ought not to be denied the benefit of such provisions simply because the transaction was motivated for tax planning purposes. In *Stubart Investments*, ..., this Court unanimously rejected the "business purpose test" and affirmed the proposition that it is permissible for a taxpayer to take advantage of the terms of the *Income Tax Act* by structuring a transaction that is solely motivated by the desire to minimize taxation.

Counsel then said that this modern approach was reinforced in *Duha Printers (Western) Ltd. v. R.* (1998), 98 D.T.C. 6334 (S.C.C.) and in *Neuman v. Minister of National Revenue* (1998), 98 D.T.C. 6297 (S.C.C.).

He then submitted that the issue was dealt with most recently and forcefully in *Shell Canada Ltd. v. R.* (1999), 99 D.T.C. 5669 (Eng.) (S.C.C.) in which McLachlin, J. (as she then was) said at page 5676:

> ...First this Court has never held that the economic realities of a situation can be used to recharacterize a taxpayer's *bona fide* legal relationships. To the contrary, we have held that, absent a specific provision of the Act to the contrary or a finding that they are a sham, the taxpayer's legal relationships must be respected in tax cases. Recharacterization is only permissible if the label attached by the

> taxpayer to the particular transaction does not properly reflect its actual legal effect: ...
>
> > Inquiring into the "economic realities" of a particular situation, instead of simply applying clear and unambiguous provisions of the Act to the taxpayer's legal transactions, has an unfortunate practical effect. This approach wrongly invites a rule that where there are two ways to structure a transaction with the same economic effect, the court must have regard only to the one *without* tax advantages. With respect, this approach fails to give appropriate weight to the jurisprudence of this Court providing that, in the absence of a specific statutory bar to the contrary, taxpayers are entitled to structure their affairs in a manner that reduces the tax payable.

Counsel submitted that in the particular context of this appeal the Agency cannot, in the absence of a sham or express statutory language, deem a *bona fide* contractor relationship to be otherwise, even if this form was purposely entered into to obtain a tax benefit. He then said that if the parties intended to create a contractor relationship and entered into their relationship believing it to be so and conducted themselves according to that belief, it is not the job of the Agency to deem it to be other than a contractor relationship.

[25] Paragraphs 77 and 92 of that judgment are also helpful:

> This case departs somewhat from the ritualistic and unadorned recitation of the four tests in *Wiebe Door* having become an inalterable juristical formula for the determination of insurable employment. Such tests alone may not contemplate a number of factors weighing upon such determination. Control exists not only in contracts of service but in contracts for service. Ownership of tools is an inappropriately revered primary test, looking to objects, equipment and space. The risk of profit or loss test, as applied, often takes a "shoe horn" approach only, considering simply whether a service provider receives a fixed formula amount and occasionally paying little attention to potential elements of risk. With respect, there seems to be little usefulness in what is described as the integration test...

> ... I accept the direction as expressed in *Shell*, that the recharacterization of legal relationships is only permissible if the label attached by the taxpayer to the transaction does not properly reflect its actual legal effect. Admittedly, this statement by the Supreme Court of Canada was in respect of tax cases. However, in the absence of clear and credible evidence that the description of a relationship is other than as agreed between arm's length parties, the description agreed upon by those parties must stand. There is no such clear and credible evidence in this case.

[26] The decision in *Wolf v. Her Majesty the Queen*, 2002 F.C.A. 96, 2002 D.T.C. 6853, provides guidance, especially paragraphs 113, 117, 120, 122 and 124:

> My colleague has explained through the case law how a contract of employment is to be distinguished from a contract for services. Whether one adopts the words I used in *Charbonneau*, ...,
>
> > We must not pay so much attention to the trees that we lose sight of the forest ... The parts must give way to the whole. (At p. 301)
>
> those used by MacGuigan J.A. in *Wiebe Door Services Ltd. v. Minister of National Revenue*, [1986] 3 F.C. 553 (Fed. C.A.),
>
> > What must always remain of the essence is the search for the total relationship of the parties. (At p. 563)
>
> or those used by Major J. in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 (S.C.C.),
>
> > 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. (At para. 47)
>
> one ends up in the final analysis, in civil law as well as in common law, looking into the terms of the relevant agreements and circumstances to find the true contractual reality of the parties.
>
> ...
>
> The test, therefore, is whether, looking at the total relationship of the parties, there is control on the one hand and subordination on the other. I say, with great respect, that the courts, in their propensity to create artificial legal categories, have sometimes overlooked the very factor which is the essence of a

contractual relationship, i.e. the intention of the parties. Article 1425 of the *Civil Code of Quebec* establishes the principle that "[t]he common intention of the parties rather than the adherence to the literal meaning of the words shall be sought in interpreting a contract". Article 1426 C.C.Q. goes on to say that "[i]n interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account".

...

In our day and age, when a worker decides to keep his freedom to come in and out of a contract almost at will, when the hiring person wants to have no liability towards a worker other than the price of work and when the terms of the contract and its performance reflect those intentions, the contract should generally be characterised as a contract for services. If specific factors have to be identified, I would name lack of job security, disregard for employee-type benefits, freedom of choice and mobility concerns.

...

Noël J.A. (concurring in result):

I too would allow the appeal. In my view, this is a case where the characterization which the parties have placed on their relationship ought to be given great weight. I acknowledge that the manner in which parties choose to describe their relationship is not usually determinative particularly where the applicable legal tests point in the other direction. But in a close case such as the present one, where the relevant factors point in both directions with equal force, the parties' contractual intent, and in particular their mutual understanding of the relationship cannot be disregarded.

...

This is not a case where the parties labelled their relationship in a certain way with a view of achieving a tax benefit. No sham or window dressing of any sort is suggested. It follows that the manner in which the parties viewed their agreement must prevail unless they can be shown to have been mistaken as to the true nature of their relationship. In this respect, the evidence when assessed in the light of the relevant legal tests is at best neutral. As the parties considered that they were engaged in an independent contractor relationship and as they acted in a manner that was consistent with this relationship, I

> do not believe that it was open to the Tax Court Judge to disregard their understanding (Compare *Montreal (City) v. Montreal Locomotive Works Ltd.* (1946), [1947] 1 D.L.R. 161 (Canada P.C.), at 170).

[27] This Court has examined the total relationship existing between the parties from the evidence provided and in light of the guidance of the case law referred as above, its conclusion is that these appeals must be allowed and the decisions of the Minister vacated.

Signed at Toronto, Ontario, this 22nd day of July 2003.

"W.E. MacLatchy"

MacLatchy, D.J.

CITATION:	2003TCC492
COURT FILE NO.:	2002-3102(EI) and 2002-3104(CPP)
STYLE OF CAUSE:	1391288 Ontario Limited and M.N.R.
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR JUDGMENT BY:	The Honourable W.E. MacLatchy Deputy Judge
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