

Docket: 2007-1292(EI)

BETWEEN:

GUEST VIDEO INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

MARCELLA RODINGER MORCOS,

Intervenor.

Appeal heard on April 28, 2008 at Toronto, Ontario

Before: The Honourable Justice T. O'Connor

Appearances:

Agent for the Appellant:	Butros Morcos
Counsel for the Respondent:	Brandon Siegal
For the Intervenor:	The Intervenor herself

JUDGMENT

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

Signed at Ottawa, Canada this 12th day of May, 2008.

"T. O'Connor"

O'Connor, J.

Citation: 2008TCC291
Date: 20080512
Docket: 2007-1292(EI)

BETWEEN:

GUEST VIDEO INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

MARCELLA RODINGER MORCOS,

Intervenor.

REASONS FOR JUDGMENT

O'Connor, J.

ISSUE:

[1] This appeal was heard at Toronto, Ontario on April 28, 2008. The issue is whether Marcella Morcos (“Marcella” or “Worker”), the daughter-in-law of Peter Morcos, sole shareholder of Guest Video Inc. (“Appellant”), was, during the period December 12, 2005 to June 30, 2006 (“Period”), employed in insurable employment by the Appellant yet was nevertheless excluded from qualifying as being in insurable employment because she was not at arm’s length with the Appellant.

FACTS:

[2] The following extracts from the Notice of Appeal signed by Peter Morcos outline the facts giving rise to this issue and express the contentions of the Appellant:

The reason for this appeal is to prove that a non-arm’s length
relation was transacted when I employed

Marcella Rodinger Morcos. Before becoming my daughter in law, she worked for me between the years 1999 and 2005 in “Giant Video Sale” store in Aurora where she was analyzing, organizing, pricing and listing on the E-Bay all movies that have good sale value.

I bought the inventory of the Brock Video Store in [sic] June 9, 05 to start a wholesale business. Then, I decided to expand the business to include retail. I needed a person with the right qualifications to scrutinize, analyze, organize and promote sale at the store and on the E-bay with the intention to turn the store into a profitable business within the coming three years.

Having worked with Marcella during the past years and knowing her capabilities I decided to use her services to reach my objective. The purpose of including the E-Bay sale is to promote the business over the Canadian border attracting foreign sale thus generating higher revenue.

I used her services starting from December 09, 2005 to lay down the basis for the E-Bay, analyze and organize the store inventory to promote sale locally and on the E-bay with the objective to increase sale.

Our sales increased and continuously kept improving day by day.

Marcella set up the rules of sale on the e-bay and trained an employee who was paid \$1,000.00 a month. During the course of his employment his salary was increased to \$1,500.00 a month with promise to increase his salary to \$2,000.00 in case the sale increased.

Marcella was receiving \$2,000.00 a month for her services from which the CPP, EI and tax were deducted and paid on a monthly basis along with the employer contribution while in my employment until she delivered her Baby in the beginning of July 2006. She had to go on maternity leave. The Record of employment was submitted and she was denied her EI payment claiming an arm’s length dealing. I reiterate that Marcella worked for me in the past and I used her services based on the knowledge of her capabilities to perform well in the type of work she best excels at and promote the business.

[3] The following extracts from the Reply to the Notice of Appeal further explain the facts giving rise to this issue and express the contentions of the Respondent:

...

6. By letter dated November 23, 2006, the Respondent informed the Worker and the Appellant that it had been determined that the Worker was not employed in insurable employment, for the period referred to herein, for the reason that the Worker and the Appellant were not dealing with each other at arm's length, pursuant to paragraph 5(2)(i) of the EIA.

7. The Appellant disagreed with the Minister's decision and filed an appeal to the Tax Court of Canada on February 21, 2007.

8. In making his decision, the Respondent relied on the following assumptions of facts:

- (a) the Appellant operates a retail video outlet;
- (b) the Appellant's sole shareholder is Butros (Peter) Morcos;
- (c) the Worker is related to the Appellant's shareholder as being her daughter-in-law;
- (d) the Worker was hired under a verbal agreement;
- (e) the Worker's duties were as followed:
 - research movies to determine their value
 - list movies for sale on E-bay
 - package and ship movies sold on E-bay
 - follow up with Canada Post with regard to claims associated with shipping
- (f) the Worker performed her duties from her personal residence;
- (g) the Worker worked 7.5 hours a day, 5 days a week;
- (h) the Worker's hours of work were not recorded;
- (i) the Worker was paid a fixed monthly salary of \$2,000.00, by cheque, on a monthly basis;

- (j) the Worker's duties were distributed to another employee and to her husband who has a business of video wholesale;
- (k) the non related worker worked at the Appellant's place of business and was paid on an hourly basis;
- (l) the Worker is related to the Appellant within the meaning of the Income Tax Act; (the "ITA");
- (m) the Worker is not dealing with the Appellant at arm's length.

8. [sic] The Respondent exercised his discretion under paragraph 5(3)(b) of the EIA and decided that the contract of employment would not be deemed to be at arm's length.

B. ISSUES TO BE DECIDED

9. The issue is whether the Worker was employed under a contract of service during the period referred to herein, within the meaning of paragraph 5(1)(a) of the EIA, and if the Worker was dealing at arm's length with the Appellant within the meaning of paragraph 5(2)(i) of the EIA.

C. STATUTORY PROVISIONS, GROUNDS RELIED ON AND RELIEF SOUGHT

10. He relies on paragraphs 5(2)(i) and 5(3)(b) of the EIA and on sections 251 and 252 of the ITA.

11. The Respondent's decision resulted from the proper exercise of his discretionary authority.

12. He submits that the Appellant did not engage the Worker in insurable employment within the meaning of paragraph 5(2)(i) of the EIA, for the period referred to herein, since the Worker and the Appellant were not dealing with each other at arm's length.

13. Considering all the facts, he submits that it was reasonable for the Respondent to conclude that the Worker and the Appellant would not have entered into a substantially similar contract of employment, if they had been dealing with each other at arm's length.

14. He requests that the appeal be dismissed.

ANALYSIS AND DECISION:

[4] I accept fully the credibility of Peter Morcos. His reasons for hiring Marcella were for business purposes and are understandable. The fact that she worked at home is not determinative. Given her experience and expertise, her salary and other terms of work were reasonable. She was not hired under conditions designed to favour a non-arm's length person.

[5] Considering all the facts, I am satisfied that the Appellant would have entered into a contract similar to Marcella's with a non-arm's length person.

[6] Consequently, the appeal is allowed and the decision of the Minister is reversed.

Signed at Ottawa, Canada this 12th day of May, 2008.

"T. O'Connor"

O'Connor, J.

CITATION: 2008TCC291
COURT FILE NO.: 2007-1292(EI)
STYLE OF CAUSE: Guest Video Inc. v. M.N.R.
PLACE OF HEARING: Toronto, Ontario
DATE OF HEARING: April 28, 2008
REASONS FOR JUDGMENT BY: The Honourable Justice T. O'Connor
DATE OF JUDGMENT: May 12, 2008

APPEARANCES:

For the Appellant: Butros Morcos
Counsel for the Respondent: Brandon Siegal
For the Intervenor: The Intervenor herself

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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