Date: 20081029

Docket: A-540-07

Citation: 2008 FCA 335

CORAM: **LINDEN J.A.**
SEXTON J.A.
BLAIS J.A.

BETWEEN:

JON STEPHEN KILBRIDE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Halifax, Nova Scotia, on October 29, 2008.

Judgment delivered from the Bench at Halifax, Nova Scotia, on October 29, 2008.

REASONS FOR JUDGMENT OF THE COURT BY: SEXTON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Halifax, Nova Scotia, on October 29, 2008)

SEXTON J.A.

[1] This is an appeal from a decision of Justice Campbell of the Tax Court, dismissing Mr. Kilbride's appeal from an assessment by the Minister of National Revenue for the 2001 and 2002 taxation years. The Minister disallowed the deduction of the appellant's claimed business expenses, on the basis that he was an employee, and not an independent contractor, of a company called Thermaray Incorporated.

[2] Thermaray is a Fredericton-based family corporation that is in the business of manufacturing heating systems. The appellant's father and brother are President and Vice-President of Operations, respectively. The appellant is a minority shareholder in Thermaray, and holds the title of Secretary-Treasurer.

[3] The appellant performed bookkeeping and technical support services for Thermaray. The trial judge found that he was responsible for the "installation, configuration and maintenance of computer systems and general accounting functions". He also attended industry events on behalf of the company and met with customers. There was evidence that some of Thermaray's customers may have considered Mr. Kilbride the Chief Financial Officer of the corporation, although it was denied that he actually held that title.

[4] There was no written contract of employment between Thermaray and the appellant, although the trial judge accepted that all parties intended that the appellant would be an independent contractor, working as a management consultant. He had considerable flexibility in his hours of work, and spent much of his time working in a home office, although he was not required by the company to maintain one. Thermaray provided the appellant a work space at its offices, complete with the software and other equipment he required to perform his duties. The evidence was that the appellant attended at Thermaray's offices almost every day, although he characterized this as a "practical" requirement. He also served as a back-up in the office when his father and brother were unavailable.

[5] The Tax Court Judge found that during the relevant period, Thermaray was the appellant's only source of income. He did not receive any benefits, sick days, or vacation time, as did other employees. While he was free to solicit outside business, he did not advertise, and did not in fact have any other clients for his consulting services.

[6] Although the appellant alleges that the Tax Court Judge employed the wrong test in deciding whether the appellant was an independent contractor, we cannot agree.

[7] The appellant further argues that that the trial judge erred in her application of the four-in-one test from *Wiebe Door Services Ltd. v. Minister of National Revenue,* 87 DTC 5025 (F.C.A.), as confirmed in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59. He alleges that Justice Campbell ignored relevant evidence suggesting that the appellant was an independent contractor, and considered facts not relevant to the *Wiebe Door* test. These are questions of mixed fact and law, and this court will not interfere with the court below in the absence of palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33).

[8] The four criteria, although not exhaustive, from *Wiebe Door* are degree of control, ownership of tools, chance of profit, and risk of loss. Justice Campbell concluded that while the control test was inconclusive, if the appellant were an employee, he would be one at a high executive level, given his degree of control over his hours of work. She found that the remaining three factors suggested that the appellant was an employee. Although the integration test may have

fallen out of favour with some courts, the trial judge found that if she was obliged to consider it, this factor also strongly suggested that the appellant was an employee.

[9] The appellant takes exception with the trial judge's application of the control test. He argues that Justice Campbell considered irrelevant factors, noting that the appellant ran the Thermaray office as backup when his father and brother were absent, that he met with company clients, and that he received nearly identical pay to his brother for several years.

[10] We do not consider these facts irrelevant. They demonstrate that despite the appellant's contention that he had total flexibility to work when and where he chose, that the company often required him to attend at the office during business hours, and approved his attendance at industry events and meetings as a representative of Thermaray. The appellant's hours of work and rate of pay show that, although he was allegedly free to choose whatever hours he wanted, that indeed he worked regular hours and was paid at a consistent rate, largely in the same way as his brother, who was definitely an employee.

[11] This is not a close case where the *Wiebe Door* test is inconclusive, requiring the court to give greater weight to the intention of the parties. Although the trial judge found that the parties may have intended the appellant to be an independent contractor, she concluded that the actual relationship did not reflect that understanding and their subjective intention must be disregarded (see *Royal Winnipeg Ballet v. Minister of National Revenue*, 2006 DTC 6323 at para. 61 (F.C.A.)).

[12] We find that the rest of the errors alleged by the appellant regarding the *Wiebe Door* test amount to an invitation to this court to re-weigh the evidence, which was canvassed extensively by the trial judge in her reasons. This is not the province of an appellate court (*Housen, supra* at paras. 23-24).

[13] Having concluded that the Tax Court Judge did not err in finding that the appellant was an employee rather than an independent contractor, we also conclude he was not entitled to deduct the claimed expenses. As an employee, he is not entitled to deduct expenses pursuant to section 18(1)(*a*) of the *Income Tax Act*, R.S.C. 1985, c. 1, as they were not incurred for the purposes of earning income from a business. The appellant did not argue that he was entitled to deduct these expenses pursuant to section 8, which applies to expenses incurred for the purposes of earning income from an office or employment. Even if he had, the appellant failed in his evidentiary burden. A taxpayer bears the onus of demonstrating that an assessment by the Minister was wrong (*Johnson v. Minister of National Revenue*, [1948] S.C.R. 486). The trial judge found that the appellant had not adduced sufficient documentation to justify his expenses, and this conclusion was eminently reasonable in light of the record.

[14] The appeal should be dismissed with costs.

"J. Edgar Sexton"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-540-07
APPEAL FROM THE JUDGMENT OF THE TAX COURT OF CANADA PER CAMPBELL J. DATED OCTOBER 30, 2007.	
STYLE OF CAUSE:	Jon Stephen Kilbride v. Her Majesty the Queen
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	October 29, 2008
REASONS FOR JUDGMENT OF THE COURT BY:	LINDEN, SEXTON, BLAIS JJ.A.
DELIVERED FROM THE BENCH BY:	SEXTON J.A.

APPEARANCES:

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