Federal Court of Appeal  Cour d'appel fédérale

Date: 20121116

Dockets: A-219-11
A-331-11

Citation: 2012 FCA 295

CORAM: **NOËL J.A.**
TRUDEL J.A.
WEBB J.A.

Docket: A-219-11

BETWEEN:

PLURI VOX MEDIA CORP.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-331-11

BETWEEN:

PLURI VOX MEDIA CORP.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on November 5, 2012.

Judgment delivered at Ottawa, Ontario, on November 16, 2012.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: NOËL J.A.
TRUDEL J.A.

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and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT

WEBB J.A.

[1] These are appeals from two decisions of the Tax Court of Canada (2011 TCC 237) rendered by Rip C.J. (the Tax Court judge) based on a common set of reasons.

[2] The appeals were consolidated by order of this Court dated October 7, 2012, the appeal in Court file A-219-11 being designated as the lead appeal. In conformity with that order the reasons which follow will be filed in Court file A-219-11 and a copy thereof will be filed as reasons for judgment in Court file A-331-11.

[3] The issue in theses appeals is whether the Tax Court judge made a reviewable error in holding that Martin Reesink was an employee and not an independent contractor in 2008 in relation to the services that he was providing to Pluri Vox Media Corp. (the "Appellant") and for which he was paid approximately $3,000 to $8,000 per month. Martin Reesink was the sole shareholder of the Appellant. The Tax Court judge held that Martin Reesink was an employee in providing these services and the Appellant has appealed that decision. Martin Reesink is a lawyer and he represented the Appellant during the hearing before the Tax Court and before us.

[4] One of the issues raised in the Notice of Appeal is whether the Tax Court judge could amend his reasons for judgment. In his reasons the Tax Court judge stated that Martin Reesink was a *de jure* director but his reasons were subsequently amended to state that he was a de facto director. At the hearing of the appeal, Martin Reesink indicated that he was no longer pursuing this issue.

[5] The main position of the Appellant during the hearing before us was simply that Martin Reesink was an independent contractor because this was the intention of the Appellant and Martin Reesink. This is different from the main argument that was presented by the Appellant before the Tax Court as identified by the Tax Court judge in paragraph 24 of his reasons:

> 24 To put the situation in blunt terms, Mr. Reesink's main argument that he is not an employee is that nobody at Pluri Vox directs his functions in the company…

[6] The Tax Court judge does not address the issue of the stated intention of the Appellant and Martin Reesink that his services would be provided as an independent contractor. However the Tax Court judge did note in his reasons that Martin Reesink was registered for the purposes of the *Excise Tax Act*. It is also clear from the Tax Court hearing (and not disputed by the Appellant) that Martin Reesink did not report any GST in relation to the amounts that he was paid by the Appellant for the services that he rendered. Had he been an independent contractor then GST would have been payable by the Appellant in relation to these amounts. In contrast, if his services were provided as an employee, no GST would have been payable by the Appellant. Given that the GST treatment is inconsistent with the alleged common intent that Martin Reesink's services were to be provided as an independent contractor, I would give no weight to this argument.

[7] While the Appellant also submitted that there were various findings of fact made by the Tax Court judge that were palpably wrong, the Appellant has failed to demonstrate any such error.

[8] There are, however, some issues that arise from the hearing that should be addressed. Although the Tax Court judge does not say so explicitly in his reasons, his remarks during the

hearing suggest that in his view Martin Reesink could not be both a director of the Appellant and an independent contractor providing other services to the Appellant.

[9] In *Zupet v. The Queen*, 2005 TCC 89, Bowman A.C.J. (as he then was) found that a person, who was the sole director of her company, also provided services to her company as an independent contractor. Bowman A.C.J., after quoting extensively from Lord Borth-Y-Gest in *Lee v. Lee's Air Farming Ltd.*, [1961] A.C. 12, made the following comments:

> 16 If the courts are to use a willing suspension of disbelief to hold that an individual can enter into a contract of service with that individual's own company, there is no reason why the same willing suspension of disbelief cannot allow the court to find that the same individual can enter into a contract for services with his or her company. Indeed the portion of Lord Borth-Y-Gest's speech in *Lee* that I have italicized recognizes that very possibility.

[10] I agree with these comments. It would also seem to me that, while this would be unusual, an individual could enter into more than one contract with his or her own company and therefore could provide services in different capacities. It follows that the simple fact that an individual is a director or an officer of a company does not, in and of itself, exclude the possibility that other services may be provided by that individual as an independent contractor. When that occurs, it will be necessary, for the purposes of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended, and the *Canada Pension Plan*, R.S.C. 1985, c. C-8, to apportion the amounts paid between the services performed in one capacity and the other.

[11] Another matter that can be usefully commented on is how the control factor is to be applied when, as is the case here, the issue is whether an individual is an employee or an independent contractor of his or her own company. As noted by the Supreme Court of Canada in *671122*

Ontario Ltd. v. Sagaz Industries Canada Inc., 2001 SCC 59 ("*Sagaz*"), in paragraph 47, control is one of the factors to be considered in making this determination. In assessing this factor in circumstances where the individual concerned is providing services to his or her own corporation, it must be remembered that the corporation is a separate person and the corporate veil is not to be pierced, except in limited situations. The Respondent submitted in her written argument that the Tax Court judge had properly applied the decisions of this court in *Meredith v. The Queen*, 2002 FCA 258, 2002 D.T.C. 7190 and *Groupe Desmarais Pinsonneault & Avard Inc. v. Canada (MNR)*, 2002 FCA 144.

[12] In *Meredith v. The Queen*, above, Malone J.A. stated at paragraphs 11, 12 and 15:

> 11. In my analysis, the Judge committed several errors in the disposition of this case. First of all, the Judge "pierced the corporate veil" insofar as he looked beyond the corporate entity itself to assess the applicant's actions. Examples are sprinkled [*sic*] thought the reasons for judgment. For instance, he held that, notwithstanding the contractual relationship between the third parties and Stem, that it was "obvious that Roeslein and Ball were hiring [Meredith's] expertise and not retaining the Company as such in that it had no other workers." He also stated that "it is apparent that [Meredith] controls the Company and uses it for his own benefit from time to time when it is convenient. The Company does not use him." Further, he also made reference to the methods by which Meredith was paid by Stem, as well as arrangements Stem had with its bank, including personal guarantees provided by Meredith.
>
> 12. Lifting the corporate veil is contrary to long-established principles of corporate law. Absent an allegation that the corporation constitutes a "sham" or a vehicle for wrongdoing on the part of putative shareholders, or statutory authorisation to do so, a court must respect the legal relationships created by a taxpayer (see *Salomon v. Salomon & Co.*, [1897] A.C. 22; *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2). A court cannot re-characterize the bona fide relationships on the basis of what it deems to be the economic realities underlying those relationships (see *Continental Bank Leasing Corp. v. The Queen*, [1998] 2 S.C.R. 298; *Shell Canada Ltd. v. The Queen*, [1999] 3 S.C.R. 622; *Ludco Enterprises Limited v. The Queen*, 2001 SCC 62at para. 51). It follows, therefore, that the Judge erred in law by inquiring into the economic

> realities of the relationship as between Stem and Meredith, when he was not authorised by statute or common law to do so.
>
> …
>
> 15. The recent decision of this Court in *Groupe Desmarais Pinsonneault & Avard Inc. v. Canada (MNR)*, 2002 FCA 144 is instructive on the issue of control. There, Noël J.A. writing for the Court indicated that the question is not whether the corporation did or did not exercise control, but whether it was in a position to do so. The importance lies in the corporation's legal power to control the employees, not whether the employees feel subject to that control. That is the case here, where Stem has contracted with arms-length third parties. It is Stem, not the applicant, with whom the third parties contracted for Meredith's expertise, and it is within Stem's legal power, as a corporation, to control Meredith. Therefore, given the corporate structure in place, it is irrelevant that Meredith is the sole shareholder and director. Based on the above authority, the Judge erred in finding that control lay in the hands of the applicant in his personal capacity.

[13] In relation to the issue of control in this case, the Tax Court judge, in paragraph 22 of his reasons, stated that:

> 22 Mr. Reesink was not engaged by Pluri Vox to perform services as a person in business on his account. He was not engaged as Pluri Vox's lawyer. The question of who controlled whom has no answer: could the corporation control Mr. Reesink since he was its sole shareholder? Obviously not, qua shareholder. But Mr. Reesink's work at Pluri Vox had nothing to do with being a shareholder. Except where there is a unanimous shareholders agreement, shareholders do not meddle in the management of the business and affairs of a corporation. It is Mr. Reesink's functions other than as a shareholder that are relevant in my view.

[14] It seems to me that in reaching the conclusions that the Appellant could not control Martin Reesink since he was the sole shareholder of the Appellant and that "[t]he question of who controlled whom has no answer", the Tax Court judge in effect pierced the corporate veil. He was also only considering whether the Appellant actually controlled Martin Reesink not whether the Appellant, as a separate legal entity, was in a position to control Martin Reesink. As noted in *Groupe Desmarais Pinsonneault & Avard Inc.* above, "[t]he importance lies in the corporation's

legal power to control the employees, not whether the employees feel subject to that control". However, in my opinion, these conclusions of the Tax Court judge would not affect the outcome in this case.

[15] As noted by the Supreme Court of Canada in *Sagaz* in paragraph 47:

> 47 …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.

[16] In the present case, the evidence shows that the Appellant retained the services of an individual by the name of Andrew Baldwin as an independent contractor. Andrew Baldwin's status as an independent contractor is not in dispute. The Tax Court judge found that Martin Reesink was supervising Andrew Baldwin and the Appellant did not challenge this finding by the Tax Court judge. It follows that if one accepts the Appellant's contention that Martin Reesink was acting as an independent contractor, the result is that one independent contractor (Andrew Baldwin) was being supervised by another (Martin Reesink) in circumstances where no contractual relationship existed between the two. The better view is that Martin Reesink was an employee (and not carrying on his own business) while supervising Andrew Baldwin.

[17] As a result I would dismiss the appeals, with one set of costs in the lead appeal.

"Wyman W. Webb"
J.A.

"I agree
Marc Noël J.A."

"I agree
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-219-11
(APPEAL FROM A JUDGMENT OF THE HONOURABLE CHIEF JUSTICE RIP DATED MAY 3, 2011 DOCKET NO. 2010-1672(IT)I)	
STYLE OF CAUSE:	PLURI VOX MEDIA CORP. V. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa,Ontario
DATE OF HEARING:	October 31, 2012
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	NOËL AND TRUDEL JJ.A.
DATED:	November 16, 2012

APPEARANCES:

Martin Reesink	FOR THE APPELLANT
Tamara Watters Rosemary Fincham	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister & Solicitor Ottawa, Ontario	FOR THE APPELLANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-331-11
(APPEAL FROM A JUDGMENT OF THE HONOURABLE CHIEF JUSTICE RIP DATED MAY 3, 2011 DOCKET NO. 2010-1687(CPP))	
STYLE OF CAUSE:	PLURI VOX MEDIA CORP. V. MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 31, 2012
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	NOËL AND TRUDEL JJ.A.
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