Tax Court of Canada Cour canadienne de l'impôt

Docket: 2004-58(EI)

BETWEEN:

ACE PAINTING & DECORATING CO.
A DIVISION OF EVAGELOU ENTERPRISES INCORPORATED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Motion heard on common evidence with the motion of *Ace Painting & Decorating Co. a Division of Evagelou Enterprises Incorporated* (2004-60(CPP)) on March 15, 2005 in Toronto, Ontario

Before: The Honourable N. Weisman, Deputy Judge

Appearances:

Counsel for the Appellant:	Marcela S. Aroca
Counsel for the Respondent:	Jeremy Streeter

JUDGMENT

Upon motion by counsel for the Appellant for Judgment allowing the appeal based upon admissions made in the Minister's Reply to the Notice of Appeal;

And upon hearing the submissions of the parties;

The motion is allowed and the decision of the Minister is vacated on the basis that the worker, Mr. Gus Mantelos, was an independent contractor.

Signed at Toronto, Ontario, this 29th day of March, 2005.

"N. Weisman"

Weisman, D.J.

Court File No. 2004-58(EI)

TAX COURT OF CANADA
IN RE: The Canada Pension Plan and
The Employment Insurance Act

B E T W E E N:

ACE PAINTING & DECORATING CO., a division of

EVAGELOU ENTERPRISES INCORPORATED

Appellant,

- and -

THE MINISTER OF NATIONAL REVENUE

Respondent.

--- Held before His Honour Judge Weisman of The Tax Court of Canada, 9th Floor, 200 King Street West, Toronto, Ontario, on the 15th day of March, 2005.

REASONS FOR JUDGMENT

(Delivered from the Bench orally

at Toronto, Ontario on March 15th, 2005)

APPEARANCES:

MARCELA S. AROCA For the Appellant

JEREMY STREETER For the Respondent

Colin F. Nethercut - Registrar/Digital Technician

-- Upon commencing at 2:21 p.m.

HIS HONOUR: I have had before me today a motion for summary judgment by the Appellant based on admissions made by the Respondent Minister in his reply to the notice of appeal. My jurisdiction to entertain this motion arises out of the Tax Court of Canada Rules in the informal procedure, specifically subparagraph 18.2. "A party may, at any stage of a proceedings, apply for judgment in respect of any matter (A) upon any admission in the pleadings or other documents filed in the court or in the examination of another party".

The argument I have heard is that in the first paragraph of his reply to the notice of appeal, the Minister, now with some regret, has made a number of easy, generous, loosely drafted, and insouciant admissions which he now attempts to abjure. And the two key admissions are with reference to the Appellant's paragraph 4 and 9.

Paragraph 4 says that Mr. Gus Mantelos was periodically subcontracted by Ace Painting to perform painting services from February 24, 2000 to October 10, 2002. The period under review is May 28th, 2002 to October 10, 2002; and, therefore, the Minister has admitted that Mr. Mantelos was a subcontractor during part of the period under review.

It was the submission of counsel for the Minister that the Minister didn't take the word "subcontracted" in paragraph 4 of the notice of appeal in

a technical sense but, rather, in a more vernacular sense as "was employed" or "was engaged" by Ace Painting. I would have to reject that submission when the whole issue in all these proceedings under Wiebe Door and under Sagaz Industries and under Precision is whether the worker was an independent contractor or a subcontractor.

That's a highly -- It's a word of art. It's a highly technical word, and I can't accept that the Minister would be right in assuming that it was used in a less-than-technical sense by the Appellant in his paragraph 4. And I find, as a matter of fact, that the Minister admitted that Mr. Mantelos was a subcontractor during some portion of the period under review.

Of greater significance is paragraph 9 and the fact that the Minister is impressing upon me his interpretation of the Minister's admission. And it states, "He admits the facts stated in paragraph 9." I am being invited to interpret that to mean that the Minister admits that the terms of the agreement between Ace Painting and Mr. Mantelos were that Mr. Mantelos was to do various things of which there are 20 specified in paragraph 9 of the notice of appeal.

I, again, have a great deal of difficulty agreeing with the Minister's contention that that is how his Admission No. 1 is to be construed i.e. that it admits only the <u>preamble</u> of paragraph 9 which states that the

terms of the agreement provided thus and so. We're not agreeing to the 20 allegations thereunder. In my view the words of paragraph 1 of the reply are that he admits the facts, and the "facts" are clearly the 20 set out under paragraph 9.

It's trite law that pleadings are a matter of great importance. They're prepared with great care by counsel, and you're bound by your pleadings. So I conclude that the Minister has admitted paragraphs 4 and 9 of the notice of appeal.

Now, as to the ramifications from that, there is an easy conclusion and a more complicated conclusion. And I will give you the benefit of both. If we refer to Roman numeral XI under paragraph 9 of the appeal that Mr. Mantelos was free to retain or hire any assistants, employees, and/or independent contractors to complete each subcontract either with him or in his stead, that admission alone is enough to decide the question in favour of the conclusion that Mr. Mantelos was an independent contractor.

I would refer counsel to the case of Ready Mixed Concrete vs. The Minister of Pensions, [1968] all England Reports, 433 in the Queen's Bench Division where it held, and I quote, "Freedom to do a job, either by one's own hands or by another's, is inconsistent with a contract of service, though a limited or occasional power

of delegation may not be." And I repeat that the admission that Mr. Mantelos was free to do the job either by his own hands or by the employment of others is inconsistent with a contract of service.

And the more complicated analysis, of course, follows the four-in-one (phonetic) guidelines set out in Wiebe Door, as confirmed by Sagaz and by Precision and by Wolfe. And starting with the issue of tools, as I've already said, I think this breakdown of the tools being partly supplied by the payer and partly by the worker fits within the fact situation of Precision Industries. And we have here the worker supplying enough tools that he had to pay for and they were his hand tools, and they were very similar to the sort of tools supplied by the workers in Precision.

And similarly to Precision, heavier equipment was supplied by the payer; and, yet, the Federal Court of Appeal held that, nonetheless, the man was an employee even though there was heavy equipment being supplied by the payer. And that conclusion is buttressed, as I've already intimated, by Assumption 7 [0] in the Minister's reply where there is clear assumption that the worker supplied his own tools of the trade such as paintbrushes and rollers.

I think, like Precision, the tool factor indicates that Mr. Mantelos was an independent contractor;

and, similarly, as counsel has set out in her brief, as buttressed by the Minister's admissions, there was virtually no control over the hours and the manner of operation in which Mr. Mantelos worked, save for the physical fact that the premises to be painted had to be open when he was there. And the only guideline or timeline was those set by the premises to be painted. So the control factor indicates that he was an independent contractor.

Without going into too much detail with reference to the chance of profit or risk of loss, once it's established that Mr. Mantelos was free to engage others, then there is both a chance of profit and a risk of loss, the chance of profit arising in a number of ways, but one of which is that he was free to engage others at $10 an hour to do the work; and he could stay home and simply reap the profit of the $5 per hour.

Of course, the cases talk about a chance of profit by the use of ingenuity and enterprise; and as has been recognized, if Mr. Mantelos was expeditious or hired enough employees, then he could do the work at the agreed-upon price in such a short time that he was free to go elsewhere and earn more money by -- as I say, by the exercise of efficiency and enterprise.

And there was a risk of loss, not only in the minor loss of the cost of his tools, but once you're

an employer, there is always that possibility that you might wind yourself up in circumstances where you're required to pay more than you agreed to receive. In other words, in this case, more than $15 per hour, which, by itself, would be a risk of loss.

So, as for the term guidelines, there is a case called Ranger vs. The Minister of National Revenue that says that these four-in-one factors are but guidelines for the court and they all indicate that this particular worker during the period in question was an independent contractor.

I am obliged by the cases such as Wolfe to ask myself, if he was an independent contractor, was he in business on his own account; and, if so, what business was it? And it's clear from the pleadings and admissions that he was a self-employed painter on his own account.

So the Appellant has demolished the relevant assumptions noted in the Minister's reply. He's discharged the burden of proof to demolish those assumptions, which means that the appeal has to be allowed and the decision of the Minister is vacated accordingly.

Counsel, I appreciate the assistance of both of you. That was an interesting day.

--- Whereupon adjourning at 2:37 p.m.

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JOHN SITA
Transcriptionist