

Docket: 2004-574(CPP)

BETWEEN:

DONALD BERGER o/a BUSY 'B' CONSTRUCTION & CONCRETE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE ,

Respondent.

Appeal heard together on common evidence with the appeal of
Donald Berger o/a Busy 'B' Construction & Concrete (2004-575(EI))
on August 9 and 11, 2005 at Prince Albert and Saskatoon, Saskatchewan

By: The Honourable Justice D.W. Beaubier

Appearances:

Agent for the Appellant: Donald Berger

Counsel for the Respondent: Julien Bedard

JUDGMENT

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

Signed at Regina, Saskatchewan, this 26th day of August, 2005.

“D.W. Beaubier”

Beaubier, J.

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Citation: 2005TCC537
Date: 20050826
Dockets: 2004-574(CPP)
2004-575(EI)

BETWEEN:

DONALD BERGER o/a BUSY 'B' CONSTRUCTION & CONCRETE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

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REASONS FOR JUDGMENT

Beaubier, J.

[1] These appeals were heard together on common evidence at Prince Albert on August 9 and at Saskatoon, Saskatchewan on August 11, 2005. The Appellant testified.

[2] The period in question is from March 1, 2002 to December 31, 2002 as set out in Schedule B to the Reply to the Notice of Appeal. Mr. Berger is not strongly literate and is of the opinion that he has appealed from 1999 through 2003. (His Notice of Appeal does not specify names or dates). As a result, the Respondent's pleadings which frequently refer to 2000, not 2002, were not permitted to be amended. On August 9, 2005 Mr. Berger could not identify various calendar years and thought that he had not employed or retained various persons in 2002. As a result, this matter was adjourned until August 11, 2005 to allow him to verify what he could from any records he might have.

[3] The particulars in the Replies are virtually identical. Paragraphs 5 to 10 inclusive of the Reply to the Notice of Appeal, 2004-575(EI) refer to 2000, not 2002. They read:

5. By Notice of Assessment dated May 15, 2003, the Appellant was assessed, among other things, for Employment Insurance premiums in the amount

of \$1,541.02 for the 2000 year for the following workers as detailed in Schedule A attached to and forming part of the Reply to the Notice of Appeal (hereinafter "Schedule A"):

Workers

Llewyl Tremblay	Ivan Pomalow
Ed Berger	Art Ashdown
Dave Cambell	Ashley Ashdown
Ashley Desrosiers	Donny Berger Jr.
Grant Kriger	

6. On May 12, 2003 the Appellant appealed the assessment to the Minister.
7. In response to an appeal to the Minister from an assessment, the Minister reduced the assessment for the 2000 year by \$19.01 as Ed Berger was not employed under a contract of service with the Appellant and confirmed the remainder of the assessment as the other workers (hereinafter the "Workers") were employed under a contract of service with the Appellant.
8. In so assessing as he did, the Minister relied on the following assumptions of fact:
 - (a) the Appellant is the sole proprietor of Busy 'B' Construction and Concrete;
 - (b) the Appellant's construction business includes building houses and pouring concrete;
 - (c) the Appellant controlled the day to day operations of the business;
 - (d) the Appellant made the major business decisions;
 - (e) none of the Workers had:
 - (i) an investment in the Appellant's business;
 - (ii) bank signing authority; or
 - (iii) a written contract with the Appellant;

Arthur Ashdown and Ashley Desrosiers

- (f) Arthur Ashdown (hereinafter "Ashdown") and Ashley Desrosiers (hereinafter "Desrosiers") were required to personally perform their services;
- (g) Ashdown provided services as a labourer;
- (h) Desrosiers built a building frame and installed metal on it;
- (i) Ashdown and Desrosiers were instructed in their duties;
- (j) the Appellant exerted substantial control over Ashdown and Desrosiers;
- (k) Ashdown supplied only small hand tools including a hammer, tape measure and apron in the performance of his duties;
- (l) Desrosiers did not supply any tools in the performance of his duties;
- (m) Ashdown and Desrosiers were not permitted to provide their own helpers;
- (n) Ashdown was paid \$15.00 per hour;
- (o) Desrosiers was paid \$9.00 - \$10.00 per hour;
- (p) the Appellant decided if work was to be redone;
- (q) Ashdown and Desrosiers were paid if they were required to redo work performed;
- (r) Ashdown and Desrosiers did not carry their own insurance coverage;
- (s) neither Ashdown or Desrosiers charged the Appellant GST;
- (t) the Appellant determined the hours and tasks for Ashdown and Desrosiers;
- (u) the Appellant instructed Ashdown and Desrosiers on the tasks to be performed;
- (v) Ashdown and Desrosiers performed their services while with the Appellant;

Llewellyn Tremblay, David Cambell, Grant Kriger, Ivan Pomalaw, Ashley Ashdown, and Donny Berger Jr. (hereinafter the "Group of Workers")

- (w) Grant Kriger passed away in March, 2003;
- (x) the Appellant obtained the contracts for his business;
- (y) the Group of Workers provided services in the form of labor to the Appellant;
- (z) the Group of Workers were paid between \$8.00 and \$10.00 per hour;
- (aa) the Group of Workers' duties included pounding nails, drywalling and digging dirt; and
- (bb) the Group of Workers provided their own small tools.

B. ISSUES TO BE DECIDED

9. The issues to be decided are:

- (a) whether the Workers were engaged under a contract of service by the Appellant; and
- (b) whether the Appellant has been properly assessed in respect of the Workers for the 2000 year.

C. STATUTORY PROVISIONS, GROUNDS RELIED ON AND RELIEF SOUGHT

10. He relies on subsection 2(1) and paragraph 5(1)(a) of the Employment Insurance Act, (the "Act").

[4] The Employment Insurance and Canada Pension Plan confirmation appealed from is dated March 18, 2003 and was filed as Exhibit R-2. It describes the period in appeal as from January 1 to December 31, 2002. The Appellant agreed that he received that and that it was appealed from and that it is in dispute in this Hearing. However there appears to be no valid timely confirmation for the other years he disputes which could be the subject of this appeal.

[5] In cross-examination on August 9, 2005 the Appellant did not materially dispute the particulars of each assumption except to state that Mr. Ashdown

supplied small tools. On August 11, 2005 he confirmed that the alleged employees worked for him in 2002 and the amounts of the alleged wages.

[6] The totality of evidence indicates that the Appellant controlled the workers, supplied or obtained the major tools, risked a profit or loss and that the workers were integrated into the work on the Appellant's construction project. They were employees of the Appellant.

[7] As a result, the appeals are dismissed. The Appellant essentially obtained the contract in question by marking the hourly wages paid up by the sum of \$2.00 per hour. Any work that had to be redone was also paid for by the original contractor on that hourly basis as was the Appellant personally. On the evidence before the Court, the Appellant may simply be a "strawman" in this arrangement. Nonetheless, on the limited evidence before the Court, he is the responsible employer.

Signed at Regina, Saskatchewan on this 26th day of August, 2005.

“D.W. Beaubier”

Beaubier, J.

CITATION: 2005TCC537
COURT FILE NOS.: 2004-574(CPP) and 2004-575(EI)
STYLE OF CAUSE: Donald Berger o/a Busy 'B'
Construction & Concrete and
The Minister of National Revenue

PLACE OF HEARING: Prince Albert and
Saskatoon, Saskatchewan

DATE OF HEARING: August 9 and 11, 2005

REASONS FOR JUDGMENT BY: The Honourable Justice Beaubier

DATE OF JUDGMENT: August 26, 2005

APPEARANCES:

Agent for the Appellant: Donald Berger

Counsel for the Respondent: Julien Bedard

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: John H. Sims, Q.C.
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