Docket: 2005-2795(IT)G

BETWEEN:

JON STEPHEN KILBRIDE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on April 12 and 13, 2007 and July 9, 2007 at Halifax, Nova Scotia

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	David J. Demirkan
Counsel for the Respondent:	John W. Smithers

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 2001 and 2002 taxation years are dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 30th day of October 2007.

"Diane Campbell"

Campbell J.

Citation: 2007TCC663
Date: 20071030
Docket: 2005-2795(IT)G

BETWEEN:

JON STEPHEN KILBRIDE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

[1] In filing his tax returns for the 2001 and 2002 taxation years, the Appellant claimed business expenses as a self-employed management consultant. The Minister of National Revenue (the "Minister") disallowed these expenses based upon the ruling that the Appellant was not a self-employed individual but that he was an employee of a company called Thermaray Incorporated ("Thermaray") formerly known as Canray Incorporated.

[2] Thermaray carries on business as a manufacturer of electric radiant heating systems with its office and plant located in Fredericton, New Brunswick. It is essentially a family owned and operated business. The Appellant's father, Bert Kilbride, is the President and majority shareholder and the Appellant's brother, Kevin Kilbride, is the Vice President of Operations. The Appellant is a Secretary-Treasurer and a minority shareholder. During the period at issue, he was also a director with signing authority. The Appellant was responsible for Thermaray's bookkeeping and technical support.

[3] The Appellant has worked for Thermaray on and off since it was incorporated in 1985. There was no written contract between the parties and no written job description for the Appellant. According to the evidence, the Appellant was responsible for the installation, configuration and maintenance of computer systems and general accounting functions, including signing purchase orders, payroll documents and banking documents. He occasionally attended trade fairs and visited customers on behalf of Thermaray. He also dealt with customer inquiries with respect to technical issues.

[4] The Appellant refers to himself as a management consultant and considered himself to be an independent contractor during this period, although Thermaray was his only source of income. As a result, he deducted various business expenses which he claims to have incurred in conducting his consulting business. These expenses, which totalled approximately $30,000.00 for each year, included those relating to a motor vehicle, use of a home office, meals and entertainment, travel and a salary paid to his wife for bookkeeping.

[5] Both Thermaray and the Appellant intended that he would be an independent contractor. This appeal arose as a result of a Canada Revenue Agency audit of Thermaray.

[6] In reassessing the Appellant, the Minister relied on the following assumptions of fact at paragraph 15 of the Reply to the Notice of Appeal:

> (b) at all material times, the Appellant worked full-time for Thermaray, a company which manufactured residential radiant heat panels;
>
> (c) Thermaray's office and plant were located together at Unit 6, 670 Wilsey Road, Fredericton, New Brunswick;
>
> (d) the Appellant's duties included accounting and computer functions as well as Thermaray's banking and overall running of the office, including the signing of purchase orders, payroll documents and banking documents;
>
> (e) The Appellant was at all material times a 4.8% shareholder of Thermaray and also became a director of Thermaray in June, 2002;
>
> (f) Thermaray is corporation controlled by the Appellant's family, with the Appellant's father being the majority shareholder;
>
> (g) the company's shareholdings are as follows:

Shareholder	Shareholdings
Bert Kilbride, President	48.8%
Provincial Holdings	20.0%
Kevin Kilbride, Vice President	14.4%
Joe Osbourne	12.0%
Steve Kilbride, Secretary/Treasurer	4.8%

(h) the Appellant submitted invoices to Thermaray for his services;

(i) no written contract existed between Thermaray and the Appellant to document the nature of his duties;

(j) the Appellant received his remuneration on a semi-monthly basis, usually at a regular rate of $2,327.08 per pay for January to November, 2001 and at a rate of $2,827.08 per pay for the remainder of 2001 and 2002;

(k) at all relevant times, Thermaray was the Appellant's only source of income;

(l) at all relevant times, the Appellant had an outstanding shareholder loan account with Thermaray;

(m) if not traveling on business for Thermaray, the Appellant was required to perform his duties at Thermaray's premises and office space was provided for him;

(n) Thermaray provided all the accounting software, computers and office equipment for the Appellant to perform his duties;

(o) Thermaray reimbursed the Appellant for travel expenses incurred while on business;

(p) the Appellant did not have any risk of profit or chance of loss with respect to his work for Thermaray;

(q) the Appellant was not required by Thermaray to maintain an office in his home;

(r) the Appellant did not operate a business during the years at issue; and

(s) the Appellant did remit HST on his earnings and claimed ITCs on his GST account.

And at paragraph 16, the Minister also relied on the following other material facts:

(a) the Appellant was the Chief Financial Officer of Thermaray and was a signing officer on Thermaray's bank account;

(b) the Appellant's brother, Kevin Kilbride, received employment income from 1999 to 2003 from Thermaray comparable to the Appellant's as follows:

Year	**Appellant's Gross Income from Thermaray**	**Kevin Kilbride Employment Income from Thermaray**
1999	$28,500	$28,500
2000	$38,200	$42,166
2001	$63,256	$58,999
2002	$59,000	$58,999
2003	$58,999	$58,999

[7] The Appellant admitted the following relevant assumptions of fact: at paragraphs 15(i), (j), (k), the last portion of (m) referencing office space, (o) and (q) and 16(b).

[8] The Appellant testified that he was always looking to attract new clients but that he was unsuccessful in 2001 and 2002. He did no advertising in the yellow pages or otherwise. He had no personal website. His evidence was that he looked for work wherever he could within the limited number of hours available to him. According to his evidence and pictures presented as exhibits, his home office consisted of a desk, two computers, some bookshelves and a closet which stored mainly computer accessories and software. His office was not used to see clients.

[9] With respect to the Appellant's work at Thermaray, he explained that there was a workspace available to him and that he was not required to maintain a home office. Thermaray owns all of the accounting software, computer and office equipment necessary for the Appellant to perform his work, although he did have

some of the same software and equipment in his home office. He was able to choose his own hours of work. He invoiced Thermaray twice monthly for his time and he was paid for the hours he worked. He has no insurance benefits, sick days or vacation time. There is no restriction on the Appellant from soliciting accounting or computer business from clients other than those of Thermaray.

[10] In cross-examination, the Appellant confirmed that when his father and brother were both out of town, he acted as the office "backup" although he denied that he had any supervisory or management responsibilities. He also confirmed that some of Thermaray's customers and contacts may have viewed him as the CFO of Thermaray. He explained that Thermaray is not overly concerned with titles, so he may have used that title for the convenience of clients.

[11] Kevin Kilbride, the Appellant's brother, testified that the Appellant has always been considered to be an independent contractor. He was not supervised in his duties and had no regular working hours. On cross-examination, he testified that his father, the Appellant and himself worked together as a team in running Thermaray. He also confirmed that the Appellant handled the office when he and his father were absent. He acknowledged that some of Thermaray's clients may have thought of the Appellant as the corporate CFO. However, he maintained that this was not the Appellant's actual title.

[12] John Mulley, a computer consultant, based in Victoria, British Columbia, testified that he and the Appellant had worked together on several projects in New Brunswick in the mid-eighties and early nineties until Mulley relocated. He stated that he and the Appellant continue to consult with each other from time to time about issues they encounter. Although they worked together on a project in 1999, he could not recall whether he worked with the Appellant on any projects in 2001 and 2002.

[13] The Appellant's position is that, as a result of the decisions in *Wolf v. The Queen*, 2002 DTC 6853, and *The Royal Winnipeg Ballet v. M.N.R.*, 2006 DTC 6323, the most important consideration in evaluating the nature of a work relationship, is the intention of the parties. Because both Thermaray and the Appellant intended that the Appellant would be an independent contractor, that is sufficient to dispose of the appeal in the Appellant's favor. In addition, the Appellant submitted that the factors of *Wiebe Door Services Ltd. v. M.N.R.*, 87 DTC 5025, support that the Appellant was an independent contractor and not an employee.

[14] The Respondent's position is that intention is just one of the tests and that it is not determinative in this appeal. It is not sufficient for the parties to simply state that they intend the work relationship to be that of an independent contractor and that in this appeal the *Wiebe Door* factors demonstrate that the Appellant was an employee of Thermaray.

[15] Counsel, for both the Appellant and Repondent, concentrated their emphasis and argument on the issue of whether the Appellant was an independent contractor or an employee of Thermaray.

[16] If the Appellant was an employee of Thermaray, the issues would then be whether he can deduct any of the claimed expenses under section 8 of the *Income Tax Act* (the "*Act*") or whether he was nonetheless carrying on a separate management consulting business during this period for which he can claim certain business expenses. However, if it is determined that he was an independent contractor for Thermaray, the issue becomes whether any of the claimed expenses were incurred in order to earn income from the Appellant's business and whether they were reasonable.

[17] I had very little evidence presented from either side in respect to the issue of the deduction of the actual expenses, particularly the nature of the expenses, why or how they were incurred and whether they were reasonable in the circumstances. I am left therefore with the problem that no matter how I might decide the employee/independent contractor issue, I have no evidence to determine whether or not the Appellant is entitled to claim all, a portion of, or none of the claimed expenses. As a result, at the very outset, I must conclude that, because no evidence was adduced to explain these expenses, I would be unable to permit the Appellant to deduct them whether I determine that he is an employee or an independent contractor of Thermaray.

[18] In the recent decision of *Lang v. The Queen*, [2007] T.C.J. No. 365, Chief Justice Bowman provided a comprehensive examination of the most recent decisions in this area and in the end summarized his conclusions from these series of cases at paragraph 34:

> (a) The four-in-one test in *Wiebe Door* as confirmed by *Sagaz* is a significant factor in all cases including cases arising in Quebec.
>
> (b) The four-in-one test in *Wiebe Door* has, in the Federal Court of Appeal, been reduced to representing "useful guidelines" "relevant and helpful in

ascertaining the intent of the parties". This is true both in Quebec and the common law provinces.

(c) Integration as a test is for all practical purposes dead. Judges who try to apply it do so at their peril.

(d) Intent is a test that cannot be ignored but its weight is as yet undetermined. It varies from case to case from being predominant to being a tie-breaker. It has not been considered by the Supreme Court of Canada. If it is considered by the Supreme Court of Canada the dissenting judgment of Evans J.A. in *Royal Winnipeg Ballet* will have to be taken into account.

(e) Trial judges who ignore intent stand a very good chance of being overruled in the Federal Court of Appeal. (But see *Gagnon* where intent was not considered at trial but was ascertained by the Federal Court of Appeal by reference to the *Wiebe Door* tests that were applied by the trial judge. Compare this to *Royal Winnipeg Ballet, City Water* and *Wolf.*

[19] In *Royal Winnipeg Ballet*, as in this case, there was no written contract but both parties were clear that they intended the relationship to be one of independent contractor. Justice Sharlow, J.A. at paragraphs 63-64 concluded that it was necessary to consider the *Wiebe Door* factors in light of the parties common understanding of their legal relationships:

> What is unusual in this case is that there is no written agreement that purports to characterize the legal relationship between the dancers and the RWB, but at the same time there is no dispute between the parties as to what they believe that relationship to be. The evidence is that the RWB, the CAEA and the dancers all believed that the dancers were self-employed, and that they acted accordingly. The dispute as to the legal relationship between the dancers and the RWB arises because a third party (the Minister), who has a legitimate interest in a correct determination of that legal relationship, wishes to assert that the evidence of the parties as to their common understanding should be disregarded because it is not consistent with the objective facts.
>
> In these circumstances, it seems to me wrong in principle to set aside, as worthy of no weight, the uncontradicted evidence of the parties as to their common understanding of their legal relationship, even if that evidence cannot be conclusive. The Judge should have considered the *Wiebe Door* factors in the light of this uncontradicted evidence and asked himself whether, on balance, the facts were consistent with the conclusion that the dancers were self-employed, as the parties understood to be the case, or were more consistent with the

> conclusion that the dancers were employees. Failing to take that approach led the Judge to an incorrect conclusion.

[20] In concurring reasons, Justice Desjardins stated at paragraph 72:

> As demonstrated by Sharlow J.A., if the intention of the parties is uncontested, save by third parties, as in the case at bar, the common-law judge has nevertheless the responsibility to "look to see" if the terms used and the surrounding circumstances are compatible with what the parties say their contract is.

[21] In *Combined Insurance Company of America v. M.N.R.*, [2007] F.C.J. No. 124, Nadon, J.A. after reviewing recent case law, including *Royal Winnipeg Ballet*, stated at paragraph 35:

> In my view, the following principles emerge from these decisions:
>
> 1. The relevant facts, including the parties' intent regarding the nature of their contractual relationship, must be looked at in the light of the factors in *Wiebe Door*, *supra*, and in the light of any factor which may prove to be relevant in the particular circumstances of the case;
>
> 2. There is no predetermined way of applying the relevant factors and their importance will depend on the circumstances and the particular facts of the case.
>
> Although as a general rule the control test is of special importance, the tests developed in *Wiebe Door* and *Sagaz*, *supra*, will nevertheless be useful in determining the real nature of the contract.

[22] All of these cases are close. It is clear that no single test is determinative. Each case requires a balancing of factors specific to that case coupled with a good dose of common sense.

[23] Following these cases, I am bound to give consideration to the intent of the parties in this appeal and to determine the weight it is to be assigned in the circumstances. However, it is also clear from the recent case law that intention alone is not a conclusive factor and that the *Wiebe Door* factors must be considered to determine whether the parties conducted their work relationship in a manner that reflected their stated intention.

[24] The four criteria of the four-in-one test of *Wiebe Door* are:

(1) degree of control;
(2) ownership of tools;
(3) chance of profit; and
(4) risk of loss.

Control

[25] According to the evidence of both the Appellant and Kevin Kilbride, he was free to choose the hours he worked and to opt for working from his home. However, the Appellant also testified that there was a practical requirement that he be at the offices of Thermaray to do most of his work.

> There is no physical requirement for me to be there (at Thermaray's premises). There is a practical requirement. (Appellant's evidence, Transcript page 48) (explanatory note in brackets added).
>
> But most of the time, of course, when I see him -- interact with him, it is usually on our premises. (Kevin Kilbride's evidence, Transcript page 39).

However, the Appellant seemed to contradict his earlier evidence when he stated (page 108 of the Transcript) that he estimated that he spent 50% of his time in his home office. Although he could choose the hours he worked, the evidence also suggests that his pay was similar to that of his brother and that he was paid at a fairly consistent rate throughout this period. He was also required to be present in the office as backup when the other family members were absent. Kevin Kilbride confirmed that the management of Thermaray was done by the three family members.

> "We work as a team." (Transcript page 24).

It appears the Appellant was subject to little supervision and was free to determine his own hours as long as he completed his work, which included not only accounting and computer technology but backup for his father and brother as well as sales and assisting builders and contractors.

> Although, some of us can do the same thing, but he's actually much better attuned at doing that and reading house plans than I am, for example. (Kevin Kilbride's evidence, Transcript page 37).

The Appellant also attended trade shows and called on customers of Thermaray. He was reimbursed for expenses in this regard. It is highly unusual for someone to be hired in the capacity of independent contractor to complete accounting and technology services and then for the company to rely on him for backup when those normally in charge are absent, to deal with builders and contractors on behalf of the company and to represent the business at trade shows. As to the flexibility of his hours, the evidence does not suggest that his hours varied to any great extent in either 2001 or 2002.

[26] The evidence, although inconclusive, also suggests that the Appellant was held out as CFO of Thermaray to both customers and the bank. He received no benefits that we usually associate with an employee such as vacation time and sick leave. On balance the factor of control is not conclusive. If the Appellant were considered to be an employee with respect to the factor of control, the evidence suggests he would be one at an executive level within a family business and not simply one with accounting and technology responsibilities.

Ownership of Tools

[27] All of the tools, including the workspace, required by the Appellant in the performance of his duties were supplied by Thermaray. Customers with problems contact the Appellant at Thermaray and not at his home office. When the Appellant purchased new equipment for the business, he used a credit card belonging to Thermaray or he was reimbursed by the company. Although the Appellant had a home office, the evidence does not support that he used it to conduct his duties for Thermaray and it was certainly not a requirement by Thermaray. This factor suggests the Appellant was an employee.

Chance for Profit / Risk of Loss

[28] Both of these factors suggest that the Appellant was an employee. He was reimbursed for all company related expenses that he incurred. There was no evidence that he had any more risk of a loss than any other employee would have except to the extent he had no sick leave. He was paid at a set hourly rate. Although he could receive more pay, if he worked more hours, this does not necessarily point to him being an independent contractor as the same terms may apply to any employee. In fact, he was paid throughout this period at a consistent rate.

Integration

[29] In the *Lang* decision, Chief Jusitice Bowman cautioned against using integration as a consideration as it is rarely determinative. However, in *Combined Insurance Company*, the Federal Court of Appeal included it among the "useful guidelines in determining whether a contract is one of employment or for services" (paragraph 38). With these comments in mind, I perilously make the following comments. If integration is to be considered at all, it certainly lends support to the position that the Appellant is an employee. He acted as backup, was considered by his brother as part of management and part of the team, customers and the bank looked to him as CFO, and he had other responsibilities within Thermaray in addition to accounting and technology support. While Thermaray could easily hire someone else to undertake accounting and technology roles, it could not easily, if at all, hire someone to assist customers, builders and contractors, represent the company at trade shows and act as backup and part of a management team.

Conclusion

[30] Although the parties contend that the Appellant is an independent contractor, the reality of their relationship does not support their stated intention. There is no evidence that the Appellant was conducting a management consulting business or that he was expending any energy or money on implementing one.

> I continued to market myself, as best as I can, in the limited amount of time that I had available to me, as sole proprietor. I only have so many hours in the day I could utilize. (Appellant's evidence, Transcript page 85)

This implies he had no time to devote to his business or to work for clients. The evidence suggests that he made no attempt to market himself or his business. Although he registered for GST and stated he tried to obtain clients by word-of-mouth, there is just no other evidence supporting the existence of a business or an effort to get one off the ground during this period. In addition, I actually had no evidence of what attempts, if any, were made by word-of-mouth to establish business contacts in this period. Everyone is free to argue they are conducting and intend to conduct a business but to make this a reality within the realm of income tax, something more concrete is required. I simply do not have that here.

[31] Lastly, I turn to the issue of expenses. As I stated at the outset, no matter how I may have determined the issue of employee/independent contractor, I am not in a position to determine deductibility of expenses because both counsel neglected

to properly address this issue and I therefore have very little evidence, except vague references, upon which to formulate any conclusions. It appeared that both counsel mistakenly approached this case as if a determination of the employee/independent contractor issue would resolve the expense issue. This is simply not so. Although the Appellant may, as an employee of Thermaray, be entitled to deduct certain expenses under section 8 of the *Act*, I have no evidence to make any conclusions. I might state however, that it would appear there would be no entitlement as he was reimbursed for expenses incurred on behalf of Thermaray.

[32] If I had determined him to be an independent contractor, carrying on an independent management consulting business, the same problem applies. I simply have insufficient evidence. For example, although it appears that the Appellant allotted between 70% to 80% of his vehicle use to business, I was not provided with a log, or records, or in fact any explanation of this breakdown. Also there was no evidence with respect to the fees of $14,000.00 paid to the Appellant's wife for "various and sundry work" (Transcript page 80). No timesheets or job description were provided and, although she could have been called, his wife did not testify.

[33] Even if the Appellant is an employee of Thermaray, as I have determined, he may still have been conducting a consulting business quite apart from this employment for which he might deduct legitimate and reasonable expenses. My conclusion respecting expenses also applies here but the evidence does not support that the Appellant was conducting his own independent business during this period. His evidence was that he was always experimenting with different server systems to find more cost efficient systems with the hope that he would be able to market these to new clients. However in 2001 and 2002, Thermaray was the Appellant's sole source of income. He never advertised in any format. Apparently he did not even hand out business cards. His own evidence was that he had little time, because of his Thermaray duties, to pursue other opportunities. If, as the Appellant's evidence suggests, he had little time to himself and he used what little time he had to improve on cost effective systems, without actually taking time to find new clients, then the logical conclusion is that he had no chance to earn any income from this work. If the Appellant actively engages in this consulting business in the future, then it is certainly open to him to properly track, record and claim legitimate and reasonable expenses associated with his business.

[34] The appeals are dismissed with costs.

Signed at Ottawa, Canada, this 30th day of October 2007.

"Diane Campbell"

Campbell J.

CITATION:	2007TCC663
COURT FILE NO.:	2005-2795(IT)G
STYLE OF CAUSE:	Jon Stephen Kilbride and Her Majesty the Queen
PLACE OF HEARING:	Halifax, Nova Scotia
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DATE OF JUDGMENT:	October 30, 2007

APPEARANCES:

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