

Docket: 2002-2008(EI)

BETWEEN:

GTW HOLDINGS COMPANY LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on October 3, 2003 at Regina, Saskatchewan

Before: The Honourable Justice Beaubier

Appearances:

Counsel for the Appellant: Dwayne M. Anderson

Counsel for the Respondent: Lyle Bouvier

JUDGMENT

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

The Appellant is awarded such costs as are allowed under the *Employment Insurance Act*.

Signed at Saskatoon, Saskatchewan, this 15th day of October 2003.

"D.W. Beaubier"

Beaubier, J.

Citation: 2003TCC721

Date: 20031015

Docket: 2002-2008(EI)

BETWEEN:

GTW HOLDINGS COMPANY LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Beaubier, J.

[1] This appeal was heard at Regina, Saskatchewan, on October 3, 2003. Thurston Lindo was the only witness.

[2] At issue is an assessment of Employment Insurance premiums for all of 1999 for Thurston Lindo, Greg Olenick and Wanda Silzer and for 2000 until September 18, for them and for Melissa Erickson and Michelle Hugel.

[3] Paragraphs 6 to 9 inclusive of the Reply to the Notice of Appeal reads as follows:

6. In response to the appeal, the Minister:
 - (a) confirmed the assessment for the 1999 year as Thurston Lindo, Greg Olenick, and Wanda Silzer were employed under a contract of service,
 - (b) varied the assessment for the 2000 year by reducing employment insurance premiums assessed by \$1,076.15 as Thurston Lindo and Greg Olenick controlled more than 40% of the voting shares of

the Appellant during the period September 19, 2000 to December 31, 2000,

- (c) otherwise confirmed the assessment for the 2000 year as Thurston Lindo, Greg Olenick, Wanda Silzer, Melissa Erickson, and Michelle Hugel were employed under a contract of service,
- (d) varied the assessment for the 2001 year by reducing employment insurance premiums assessed by \$1,474.97 as Thurston Lindo and Greg Olenick controlled more than 40% of the voting shares of the Appellant, and
- (e) otherwise confirmed the assessment for the 2001 year as Melissa Erickson was employed under a contract of service.

7. In so assessing as he did with respect to Thurston Lindo, Greg Olenick, Wanda Silzer (collectively hereinafter "the Workers"), the Minister relied on the following assumptions of fact:

- (a) the Appellant owns and operates a hairdressing business;
- (b) the Appellant was incorporated in 1998;
- (c) the business license was in the Appellant's name;
- (d) the Workers were the directors of the Appellant's corporation;
- (e) the Workers were hired as hairdressers and their duties included hair services, answering the telephone, and reception duties;
- (f) monies were placed in the Appellant's central till;
- (g) the Workers were paid weekly by cheque;
- (h) the Appellant paid the Workers;

- (i) the Workers reported to the directors of the Appellant;
- (j) the Workers were required to complete reports;
- (k) walk-ins were handled by whoever was available;
- (l) the Appellant provided the tools and equipment required including a full furnished work location, a central till, and cleaning equipment;
- (m) the Workers provided their own handle tools;
- (n) the Workers paid a weekly chair rental fee to the Appellant;
- (o) the Appellant paid the operating expenses including rent, utilities, insurance, and maintenance;
- (p) the Appellant provided the supplies including towels, coffee, stationary, laundry soap, paint, light bulbs, and cleaning products;
- (q) the Workers, as directors, were required to function in a manner consistent with the best interests of the Appellant;
- (r) the Workers were employed under a contract of service by the Appellant;
- (s) the Workers were not the owners or operates (SIC) of the business, this was the Appellant's business;
- (t) wages paid by the Appellant to the Workers, for the period January 1, 1999 to September 18, 2000, are detailed as follows:

	<u>1999</u>	<u>1/1/00 to 18/9/00</u>
Thurston Lindo	\$45,193.80	\$28,507.96
Greg Olenick	\$40,059.75	\$30,808.96
Wanda Silzer	\$11,141.18	\$ 8,029.45

B. ISSUES TO BE DECIDED

8. The issue to be decided is whether the Workers were engaged under a contract of service with the Appellant for the period January 1, 1999 to September 18, 2000.

9. If the Court finds that the Workers were not employed under a contract of service with the Appellant, which is not admitted but denied, the alternative issue to be decided is whether the Workers were in insurable employment pursuant to paragraph 6(d) of the *Employment Insurance Regulations*.

[4] The following assumptions of fact were not refuted by the evidence: 7(b), (c), (d), (f), (m), (n), and (o).

[5] Respecting the remaining assumptions:

7(a) The essence of the Appellant's evidence is that each hairdresser owns his or her own "chair". There is no evidence as to whether the Appellant actually owned the chair from which each hairdresser operated except Mr. Lindo's statements. Therefore the Court finds that the chairs were owned by the individual hairdressers. They each owned all of their tools and inventory of lotions, etc. which they used in their work and sold to their clients. They each paid the Appellant \$150 per week rent which was used by the Appellant to pay the rent, electricity, business license and water. The business license was owned by the Appellant, not the individual hairdressers.

7(e) Whoever was free answered the phone. There was no walk-in business. Each hairdresser had his or her own customers who made appointments.

7(g), (h) Each hairdresser paid any receipts into a central cash box and kept a copy of each receipt. At the end of each week \$150 was taken for the Appellant's rent and the hairdresser kept the rest of his or her receipts. There is no evidence as to whether this was done by cheque, but Mr. Lindo's testimony appeared to indicate that the money was simply distributed among them. The Appellant did not make a profit and was not intended to.

7(i), (j) The Workers did not report to anyone.

7(k) Is true, but there were none to speak of. The Appellant's location was not conducive to walk-in business. Messrs. Lindo and Olenick had worked elsewhere together before 1998 and "ATM", the first name initials of the founders, was set up when they took their customers and went on their own.

7(l) The Appellant only provided the work location, cleaning equipment and central till.

7(p) These were paid for out of the \$150 per hairdresser per week.

7(q) The Workers never acted as "directors". Rather, they acted as, and considered themselves, individual entrepreneurs.

7(r), (s), (t) Are the subject of the dispute.

[6] The issue between the parties centres on paragraph 6(d) of the *Employment Insurance Regulations* which reads:

6. Employment in any of the following employments, unless it is excluded from insurable employment by any provision of these Regulations, is included in insurable employment:

...

(d) employment of a person in a barbering or hairdressing establishment, where the person

(i) provides any of the services that are normally provided in such an establishment, and

(ii) is not the owner or operator of the establishment;

[7] In part, Appellant's counsel's argument centred on whether each "chair" constituted an "establishment".

[8] Black's Law Dictionary (Seventh Edition) defines an "establishment" as:

An institution or place of business.

And a "business" is defined as:

A commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain.

[9] As a result, an establishment, like a business, can be identified on the basis of a profit motive. I have already noted at paragraph [5] that the Appellant corporation did not earn a profit, and did not intend to.

[10] In *Fleming v. American Stores Co.*, D.C. Pa., 42 F. Supp. 511, 521, (a US case) the court noted that:

Because a unit of an enterprise is a component or necessary part of that enterprise, it does not follow that it should be so regarded as part and parcel of the whole enterprise as to lose its individual and separate identity as an "establishment".

[11] An establishment, therefore, is not always the simple sum of various related units or parts. In some cases, several establishments can exist within a single enterprise. In order to distinguish 1) an establishment that is the sum of its parts from 2) an enterprise that is comprised of discrete establishments, one must look to the place where the profits are recognised. The establishment is the place where the profits are recognised as such.

[12] In the present case, each Worker operated a stand-alone business, independent of the others. They did not advertise as a group, and it is not even possible to say that they were working together to a common end. Profits were earned at the chair level and were distributed at the chair level. Consequently, in this particular case, I find that each "chair" is a separate establishment for the purposes of paragraph 6(d) of the *Employment Insurance Regulations*.

[13] There also arises the question as to whether the hairdressers were "employees" based on the facts found. Using the criteria reviewed in *Wiebe Door Services Ltd. v. Minister of National Revenue*, 87 D.T.C. 5025, the Court finds:

1. Control

The Appellant did not exercise control over the hairdressers, who came and went and kept the hours that each individual chose.

2. Tools

Each hairdresser owned his or her own tools and inventory.

3. Risk of Loss / Chance of Profit

Each hairdresser had this risk and this chance.

4. Integration

No hairdresser's work was integral to the Appellant's. The Appellant did not even advertise. Some of the hairdressers did very small amounts of advertising. The Appellant's business was really to be a rental agency of the location, including the business license – whether the latter was legal or not. Thus, in this case, each chair really did constitute that hairdresser's establishment. Each chair was, to use the words of the *Shorter Oxford Dictionary* respecting "establish", that hairdresser's "set up on a secure basis."

[14] The appeal is allowed. The Appellant is awarded such costs and disbursements as are permitted by the *Employment Insurance Act*.

Signed at Saskatoon, Saskatchewan, this 15th day of October 2003.

"D.W. Beaubier"

Beaubier, J.

CITATION: 2003TCC721

COURT FILE NO.: 2002-2008(EI)

STYLE OF CAUSE: GTW Holdings Company Ltd. v. The
Minister of National Revenue

PLACE OF HEARING: Regina, Saskatchewan

DATE OF HEARING: October 3, 2003

REASONS FOR JUDGMENT BY: The Honourable Justice Beaubier

DATE OF JUDGMENT: October 15, 2003

APPEARANCES:

Counsel for the Appellant: Dwayne M. Anderson

Counsel for the Respondent: Lyle Bouvier

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