

Docket: 2008-1021(EI)

BETWEEN:

VAN DE'S ACCESSIBLE TRANSIT INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on May 27, 2009, at Regina, Saskatchewan

Before: The Honourable Justice D.W. Beaubier

Appearances:

Agent for the Appellant:	Delmo Van de Kamp
Student at Law:	Roxanne Gagné
Counsel for the Respondent:	Lyle Bouvier

JUDGMENT

The appeal is dismissed and the decision of the Minister of National Revenue is confirmed.

Signed at Edmonton, Alberta, this 3rd day of June 2009.

“D.W. Beaubier”

Beaubier D.J.

Citation: 2009TCC297
Date: 20090603
Docket: 2008-1021(EI)
2008-1023(CPP)

BETWEEN:

VAN DE'S ACCESSIBLE TRANSIT INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Beaubier, D.J.

[1] These appeals were heard together on common evidence at Regina, Saskatchewan on May 27, 2009. Mr. Delmo Van de Kamp testified for the Appellant. The Respondent called Thomas Abrook, the alleged employee.

[2] The particulars in dispute are set out in both Replies to the Notices of Appeal. The assumptions in each are identical. Paragraphs 4, 5 and 6 of the Reply in appeal 2008-1021(EI) read:

4. In response to the appeal, the minister decided that the Worker was employed under a contract of service with the Appellant for the period January 1, 2006 to June 10, 2006.

5. In so deciding as the Minister did with respect to the Worker, the Minister relied on the following assumptions of fact:

- (a) the Appellant was in the transportation business;
- (b) the Appellant held a business license with the City of Regina;

- (c) the Appellant held an operating certificate from the province;
- (d) the Appellant owned vehicles which were equipped for handicap transport (hereinafter “the Client”);
- (e) the Worker was hired as driver and his duties included transporting people;
- (f) the worker did not enter into written contract or lease agreement with the Appellant;
- (g) the Worker earned a set commission of 45% of the fares;
- (h) the Appellant determined the amounts charged to the Client;
- (i) the Appellant determined the Worker’s wage rate;
- (j) the Worker did not invoice the Appellant;
- (k) the Appellant determined the days and shifts the Worker worked;
- (l) the Appellant exercised control over the Worker;
- (m) the Appellant provided the Worker with direction and instruction;
- (n) the Appellant set the Worker’s deadlines and priorities;
- (o) the Worker reported to the Appellant every morning;
- (p) all trips were booked through the Appellant;
- (q) the Worker provided the Appellant with daily trip sheets and charge slips;
- (r) the Worker could not hire his own helpers or replace himself;
- (s) the Appellant provided all of the tools and equipment required including the vehicle;
- (t) the vehicle license plate was in the Appellant’s name;
- (u) the Worker did not lease the vehicle from the Appellant;
- (v) the Appellant paid for the vehicle operating expenses including fuel, insurance, repairs, maintenance and washes;
- (w) the Worker did not incur any expenses in the performance of his duties;

- (x) the Worker did not have a chance of profit or risk of loss;
- (y) the Worker's intent, while working for the Appellant, was employment;
- (z) the Worker did not declare business income on his 2006 income tax return, and
- (aa) the Worker was not in business for himself while performing services for the Appellant.

ISSUES TO BE DECIDED

6. The issue to be decided is whether the Worker was employed under a contract of service with the Appellant during the period January 1, 2006 to June 10, 2006.

[3] None of the assumptions in paragraph 5 were refuted except as described herein respecting subparagraphs:

- (g) At the beginning the commission was 45%, but at the end it was 40%.
- (r) Mr. Van de Kamp testified that Mr. Abrook could replace himself with a qualified licenced driver. In fact, Mr. Abrook's only replacement was another of the Appellant's drivers.
- (s) Mr. Van de Kamp testified that he had a deal with Mr. Abrook to sell him a 1996 Ford van used to transport school children. Both men testified about the alleged deal. The Court finds that there never was a contract of sale to Mr. Abrook; it was merely a conversation piece between them. The van was owned by the Appellant.
- (x) The worker was at risk depending on the number of transport calls that the Appellant assigned to him each day.

[4] The Court finds that Mr. Abrook signed a form of "lease" (Exhibit A-2) with the Appellant. Mr. Abrook didn't "recall" that document. However, while it purports to be a lease, it was merely a form that doesn't specify exactly what is leased. It does state that Mr. Abrook is responsible for any accidents and the Appellant enforced this with another driver who had an accident. The Court finds that this document is a self-serving form of the Appellant's and that in so far as it is enforceable, it merely sets out a set of rules of conduct for the individual employee, but its financial terms respecting the vehicle are fictitious and unenforceable in a court of law. Moreover, the Appellant paid Mr. Abrook in cash many times and may have levied its payments on the Ford van onto Mr. Abrook's compensation. As a result, the amount found by

the Respondent to be Mr. Abrook's leviable compensation is confirmed due to the self-serving and indeterminate actions of the Appellant in paying cash and alleging a form of "deal" with the Ford van.

[5] However, all of the other criteria of employment of Mr. Abrook existed and the Appellant controlled the number of transport calls it received that would be assigned to Mr. Abrook or alternatively to its other drivers.

[6] For these reasons these appeals are dismissed.

Signed at Edmonton, Alberta, this 3rd day of June 2009.

"D.W. Beaubier"

Beaubier D.J.

CITATION: 2009TCC297
COURT FILE NO.: 2008-1021(EI)
STYLE OF CAUSE: VAN DE'S ACCESSIBLE TRANSIT INC.
AND HER MAJESTY THE QUEEN
PLACE OF HEARING: Regina, Saskatchewan
DATE OF HEARING: May 27, 2009
REASONS FOR JUDGMENT BY: The Honourable Justice D.W. Beaubier
DATE OF JUDGMENT: June 3, 2009

APPEARANCES:

Agent for the Appellant: Delmo Van de Kamp
Student at Law: Roxanne Gagné
Counsel for the Respondent: Lyle Bouvier

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:

John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada