

Docket: 2009-2877(CPP)

BETWEEN:

SEEISLAM INC. O/P TRUEPATH LOGISTICS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on April 15, 2010, at Windsor, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Agent for the appellant: Zafar M. Jutt

Counsel for the respondent: Natasha Wallace

JUDGMENT

The appeal under the *Canada Pension Plan* is allowed and the Minister's decision of February 5, 2009 is vacated in accordance with the Reasons for Judgment attached hereto.

Signed at Ottawa, Canada, this 4th day of May 2010.

"Patrick Boyle"

Boyle J.

Citation: 2010 TCC 243
Date: 20100504
Dockets: 2009-2877(CPP)

BETWEEN:

SEEISLAM INC. O/P TRUEPATH LOGISTICS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] The appellant corporation has appealed from an assessment of *Canada Pension Plan* (“CPP”) contributions in respect of amounts paid by it to Messrs. Mustafa Rahmani-Kouadri and Amir Qadeer.

[2] The appellant was represented by one of its directors, Messrs. Jutt. Rahmani-Kouadri and Qadeer were also directors of the corporation at the relevant times. At some stage Mr. Jutt’s son also served as director.

[3] Mr. Jutt testified on behalf of the appellant. His testimony was clear and well organized. It was also consistent in cross-examination, consistent with his earlier communications with the Canada Revenue Agency (“CRA”), consistent with his contemporaneous documentation, and largely consistent with the answers written by Messrs. Rahmani-Kouadri and Qadeer in their CRA Questionnaires. The Court accepts Mr. Jutt’s testimony. There was no conflicting testimony from the respondent’s witness nor was there other material evidence which conflicted with his testimony.

[4] The sole question is whether Messrs. Rahmani-Kouadri and Qadeer were employees or were self-employed truck drivers. Neither of Mr. Rahmani-Kouadri nor

Mr. Qadeer testified but at this stage neither lives in Windsor. One now lives in western Canada and the other in Quebec.

[5] Based upon the facts as set out below, and the reasons set out below, the Court is satisfied that neither Mr. Rahmani-Kouadri nor Mr. Qadeer was an employee of the appellant corporation. They were therefore not in pensionable employment for CPP purposes and the appeal will be allowed. The Court is satisfied that Messrs. Rahmani-Kouadri and Qadeer were not only independent contractors not employees of the business, but were in fact full and financially equal co-venturers in the business with Mr. Jutt. Frankly, given the facts and assumptions set out in the reply filed by the respondent, I am surprised this proceeded to trial.

[6] It appears that the appellant's problems arose because it issued T4A forms to Messrs. Rahmani-Kouadri and Qadeer in respect of their share of the business profits. Mr. Jutt explained that these were issued in error based upon a misunderstanding of Canadian filing requirements and because he thought some documentation was necessary to substantiate their income tax reporting. The business was one of primarily cross-border truck transport between Michigan and Ontario. In its reply the respondent expressly agrees that the T4A forms were filed by mistake.

[7] Messrs. Jutt and Rahmani-Kouadri started to carry on a transport business together under the name Truepath Logistics. They had the appellant incorporated for this purpose. They were equal partners throughout. While Mr. Jutt could drive smaller trucks it was Mr. Rahmani-Kouadri who had an AZ license. Mr. Jutt was primarily responsible for administration, regulatory and compliance matters, and served as primary customer contact and dispatcher. That is, Mr. Jutt primarily worked in the office while Mr. Rahmani-Kouadri primarily drove large trucks. At a later point in the year, Mr. Qadeer joined the business as a driver and third equal partner. These three operated their business in the corporation as a partnership in Mr. Jutt's words. A lawyer might describe the business structure as a joint venture corporation. Trucks were leased by the appellant as was office space. Necessary licenses and permits were obtained. A corporate credit card was arranged and cards were issued bearing the names of each of Messrs. Jutt, Rahmani-Kouadri and Qadeer. Each of these three helped finance the business using their personal credit as the business fortunes declined when diesel fuel costs spiked. Each of them was on call for work "24/7" as customers needed and work was available. The business hired two others as employee during the period. The employees did not provide financing to the business and were not issued corporate credit cards.

[8] Mr. Jutt was clear in cross-examination that it was their collective intention at the time that they would not be employees but would be independent contractors and equal partners. At the outset, each of Messrs. Jutt and Rahmani-Kouadri were entitled to one-half of the net profits of the business. When Mr. Qadeer joined mid-year a 50:50 accounting was done for Messrs. Jutt and Rahmani-Kouadri and thereafter the three venturers shared net profits in equal thirds. During the year regular advances were made based upon a percentage of the gross revenues and these advances were accounted for when net profits were computed and allocated at the end of the fiscal period. The employees did not participate at all in profits and were solely paid a percentage of the fee charged per load driven by them.

[9] Each of Messrs. Rahmani-Kouadri, Qadeer and Jutt bore all of the risk of loss and chance of profit in this venture. They bore it equally except to the extent that the amounts loaned by each to the company, when it got into financial difficulty, was different reflecting their different available credit resources.

[10] At the end of its fiscal period, the corporation was virtually flat economically since the net income was paid out to the three venturers. The income statement for the relevant period shows a \$300 loss on gross revenues of more than \$250,000 and shows almost \$100,000 paid out to Messrs. Jutt, Rahmani-Kouadri and Qadeer. These amounts are recorded as payable to "Trades and subcontractors" whereas the amounts paid to the employees are recorded under "Salaries and wages".

[11] All of the shares of the appellant were registered to Mr. Jutt. He explained this was probably a mistake. In the circumstances, this is not particularly relevant since the corporation would never have retained earnings as it distributed 100% to its three principals.

[12] In addition to the evidence summarized above, it should be noted that, amongst the assumptions of fact set out by the respondent in its reply are that:

- (i) Messrs. Jutt, Rahmani-Kouadri and Qadeer controlled the day-to-day operations of the appellant;
- (ii) Messrs. Rahmani-Kouadri and Qadeer were responsible for finding loads and estimating costs as well as their driving responsibilities;
- (iii) Messrs. Rahmani-Kouadri and Qadeer were not directly supervised by the appellant; and

- (iv) Messrs. Rahmani-Kouadri and Qadeer were not provided with written or oral directions and instructions on how to complete their work nor were they provided with any training by the appellant or instructed on the use of tools, equipment or materials in performing their services.

These assumptions were not contradicted by the evidence at trial and are in fact consistent with that evidence.

I. Law

[13] The tests for a contract of service / employment versus a contract for services / independent contractor are well settled. The issue of employee versus independent contractor for purposes of the definitions of pensionable employment and insurable employment are to be resolved by determining whether the individual is truly operating a business on his or her own account. This is the question set out by the British courts in *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 (Q.B.D.), approved by the Federal Court of Appeal in *Wiebe Door Services Ltd. v. M.N.R.*, 87 DTC 5025, for purposes of the Canadian definitions of insurable employment and pensionable employment, and adopted by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983. This question is to be decided having regard to all of the relevant circumstances and having regard to a number of criteria or useful guidelines including: 1) the intent of the parties; 2) control over the work; 3) ownership of tools; 4) chance of profit / risk of loss and 5) what has been referred to as the business integration, association or entrepreneur criteria. There is no predetermined way of applying the relevant factors and their relative importance and their relevance will depend upon the particular facts and circumstances of each case.

[14] The decision of the Federal Court of Appeal in *The Royal Winnipeg Ballet v. M.N.R.*, 2006 FCA 87, 2006 DTC 6323, highlights the particular importance of the parties' intentions and the control criterion in these determinations. This is consistent with the Federal Court of Appeal's later decisions in such cases as *National Capital Outaouais Ski Team v. Canada (The Minister of National Revenue)*, 2008 FCA 132, *Combined Insurance Company of America v. Canada (The Minister of National Revenue)*, 2007 FCA 60, and *City Water International Inc. v. Canada (The Minister of National Revenue)*, 2006 FCA 350. The Reasons of this Court in *Vida Wellness Corporation (Vida Wellness Spa) v. M.N.R.*, 2006 TCC 534, also provide a helpful summary of the significance of the Royal Winnipeg Ballet decision.

II. Analysis

[15] The principals or co-venturers in an incorporated business are generally able to choose how the business profits are to be distributed. A common choice in owner-managed businesses is between salary and dividends. They will also often be free to choose between an employment contract and independent contractor self-employed status given the considerations of intention, control and the risk of profit and loss.¹ Truck drivers are commonly employees and are commonly independent contractors.

[16] The evidence is clear and uncontradicted that it was intended from the outset that Messrs. Rahmani-Kouadri and Qadeer would not be employees. There was no regulatory requirement that prevented such an arrangement. With the exception of the T4A forms which are agreed by both sides to have been issued in error, the parties' behaviour throughout was consistent with this intention.

[17] The CRA witness did testify that in 2007 both Messrs. Rahmani-Kouadri and Qadeer reported their share of income as "Other employment income" in their tax returns. This would be consistent with the mistaken T4As. She further testified that neither claimed any deductions for such things as business use of their personally owned automobiles. Such an overlooked possible deduction is not particularly relevant given that most of their expenses were booked in the corporation.

[18] Mr. Jutt testified that he was familiar with Mr. Qadeer's 2008 tax return. Since Mr. Qadeer was his first cousin, he had arranged to have a common accountant prepare it. Mr. Jutt reviewed it and sent it to Mr. Qadeer once prepared. According to Mr. Jutt's testimony, Mr. Qadeer did claim automobile expenses and meal expenses in his 2008 tax return. The CRA's witness did not have any information on the 2008 tax return since the appeal only involved 2007.

[19] A consideration of the parties' intentions points wholly to independent contractor status.

[20] Mr. Jutt's evidence was clear that the principals and co-venturers together controlled the business and that he did not control the work of his partners. The Crown's assumptions in its reply were consistent with this. Neither the corporation

¹ For a somewhat longer discussion of owner-managers being employees or independent contractors, the relevance of intention and control in such a case, and the confusion inherent in the use of the term "self-employed", see *New Age Transport Inc. v. M.N.R.*, 2008 TCC 146, at paragraphs 19 and 20.

nor Mr. Jutt on its behalf exercised the degree of control over Messrs. Rahmani-Kouadri and Qadeer that an employer would be expected to have over the work of its employees.

[21] Messrs. Rahmani-Kouadri and Qadeer fully participated in the upside and downside of the trucking business. As equal economic partners in the business, it can be said that no one participated anymore than they did. Further, they provided financing to the corporation which is something quite unusual for employees to do.

[22] The trucks and other equipment were all owned by the appellant corporation. Although for whatever reason they were not issued shares in the corporation, given the equal sharing of net profits, they were owners of the business and bore their equal share of the expenses of acquiring, financing, maintaining, insuring and refuelling the trucks. This is also unusual for employees.

[23] In summary, each of Messrs. Rahmani-Kouadri and Qadeer are business owners who did not choose to be employees. The appeal is allowed.

Signed at Ottawa, Canada, this 4th day of May 2010.

"Patrick Boyle"

Boyle J.

CITATION: 2010 TCC 243

COURT FILE NO.: 2009-2877(CPP)

STYLE OF CAUSE: SEEISLAM INC. O/P TRUEPATH
LOGISTICS v. THE MINISTER OF
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PLACE OF HEARING: Windsor, Ontario

DATES OF HEARING: April 15, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Patrick Boyle

DATE OF JUDGMENT: May 4, 2010

APPEARANCES:

Agent for the appellant: Zafar M. Jutt

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