Citation: 2011 TCC 19
Date: January 24, 2011
Dockets: 2010-659(CPP)
2010-660(CPP

BETWEEN:

1663254 ONTARIO INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

(Edited from the transcript of Reasons for Judgment delivered orally from the Bench on December 3, 2010 in Ottawa, Canada)

Campbell J.

[1] Both of these appeals were heard together on common evidence. As a result of CPP Contributor Program reviews, the Minister of National Revenue - I am going to refer to as the "Minister" - assessed the two Appellant corporations in March of 2009 for Canada Pension Plan - I'm going to refer to that as "CPP contributions" - plus interest and penalties for the 2006 and 2007 taxation years.

[2] These assessments were in respect of two workers, Mr. Andre Theriault and Mr. Michael Skelton. The issue in both appeals is the same: whether the two workers were engaged by the Appellant corporations pursuant to a contract for services or a contract of services or, more simply stated, were the workers employees or independent contractors of the Appellant corporations? If they are employees, they will be engaged in insurable employment, and if they are found to be independent contractors, of course they will not be.

[3] I heard evidence from two witnesses, John Van Zanten and Michael Skelton. The Minister relied on the assumptions of fact attached as Schedules "A" and "B" to my Reasons.

[4] Mr. Van Zanten testified regarding the basic corporate structure that evolved as a result of Mr. Skelton and this witness collaborating on a business arrangement in March of 2005. Mr. Skelton approached Mr. Van Zanten with a business proposal respecting start-up operations for a service provider of fibre optic splicing to telecommunication entities. Mr. Van Zanten completed what he referred to as a "due diligence" review in this area and discovered that these two workers were sought after, highly-skilled individuals within Ontario. Very few others possessed the skill set of fibre optic welders. Mr. Van Zanten had been approached for financing and his testimony reflects that, after he completed his homework and decided to enter this venture with these two individuals, he used a model that he had been given at Queen's University in respect to construction endeavours and, with his background as a lawyer, he incorporated several numbered companies, two of which were the Appellant corporations.

[5] Mr. Van Zanten continues today to manage the books for all of these numbered companies, and is intricately involved in the business operations. It is the workers, as confirmed by Mr. Van Zanten's testimony, who provide the particular and necessary skills for the success of this business operation. Both workers are specialized fibre optic welders whose responsibility it is, according to the evidence, to splice fibre optic cable for a variety of customers of one of the corporate entities, Direct Fibre Tek Solutions Inc. I am going to refer to that company simply throughout as "DF".

[6] In setting up his corporate model, Mr. Van Zanten testified that, in acting as a business advisor to the Appellants, he followed the owner/operator model of construction companies. He stated that it was the aim of the parties to avoid any appearance of employee/employer relationship because of the rather severe constraints that the Ontario *Employment Standards Act* imposed on employees' working hours. If the workers were employees, their business venture would be less profitable because the workers, if employees, would be limited in the number of hours they could work weekly. Mr. Van Zanten, in fact, stated that he would never have entered into this business venture with the workers if they could not have avoided the workers being classified as employees and, consequently, limited by and subject to the provisions of the *Employment Standards Act*.

[7] Mr. Van Zanten characterized the Appellant corporations as conduits incorporated for the purpose of tax planning, as the vehicles through which monies flowed to the workers and as the mechanism used to clarify the relationship between the parties and the entities in accordance with their business model, which he adopted from Queen's University, and in accordance with the intention of the parties.

[8] DF used the services of both of these workers. When customers required fibre optic work, they invariably contacted the workers directly through the customer project manager. Most often, this was done by e-mail. DF's involvement, after the workers submitted a draft account on the completion of the work, would be to complete the final account for the customer. Mr. Van Zanten stated, however, that the workers themselves did not bill DF for their services. He confirmed that the Appellants were never provided with any of the work information, the work orders, the invoices or any specifics relating to these work projects.

[9] According to his evidence, none of the numbered companies advertised for business, kept phone lines or maintained business offices and they had no customers or assets. In addition, there was no other source of revenue for the Appellants except as funds flowed through from DF to the workers. When a project was completed and money received, DF first paid out expenses, and only if there were excess monies available did the flow of funds trickle down to the workers through the Appellants. No cheques were exchanged and this flow was by deposit. According to Mr. Van Zanten, if DF had no money left after expenses, the workers received no money in respect of that project.

[10] The next witness, Mr. Skelton, testified that he is one of a very small, select group in Ontario that possess this specialized skill of fibre optic welding. Corporations that require this skill know who these individuals are and actively seek them out to provide the services of splicing fibre optic cable. The workers are contacted in most cases directly by e-mail, although they are considered the customers of DF. Both these workers determine their schedules as they relate to work in progress and projects just being taken on. These schedules are influenced largely by customer needs, but, to some extent, they are able to manipulate their scheduling to attend to family or personal commitments.

[11] Although he has never had to deal with a customer complaint, if one arose, he testified that the customer would likely contact him directly and he would correct that problem on his own time and without compensation. All of the necessary information or specifics required for completion of a work project are communicated directly from the project manager of the customer to the workers. The Appellants are never involved and none of this information is ever relayed to the Appellants.

[12] Mr. Skelton started working in this field as an employee for such corporations as Centrix and Accon, where he was paid an hourly rate no matter how many jobs he completed. He had a benefit package and generous vacation benefits. In the present

arrangement, the workers received no benefits, no medical and drug plan, no sick days and no vacation time. Mr. Skelton recognizes he is the sole shareholder of the pertinent Appellant corporations and that they acted as a conduit through which his money flowed from DF on the completed projects. He acknowledged that he had no special expertise or knowledge as to why the corporate network of the companies had been established as they had been by Mr. Van Zanten. In fact, Mr. Skelton, on cross-examination, was not sure what a director was. He did, however, know that it was his intent to be an independent contractor in this business relationship with Mr. Van Zanten so that he would not be limited in the hours that he could work in order that the profit margin would be increased. Mr. Skelton explained that his monetary return is not based on the number of hours he worked but, instead, relates first to the existence of profit margin in DF at the end of the day in respect to a work project, and second, on his personal efficiencies in completing projects quickly. He compared this to the automotive industry where, if an hourly rate is charged for one task, but several different tasks can be completed within that hour and billed out, then the profit potential increases.

[13] Lastly, with respect to equipment and tools, Mr. Skelton indicated that he owned a basic tool box containing cutters and screwdrivers, *et cetera*, but that all of the specialty equipment for the splicing was supplied by DF and not the Appellants. The customers supplied no tools, but did provide the necessary materials to house specific items at the work project site.

[14] I turn now to my analysis. Let me say at the outset that, when I initially read through the Minister's Assumptions of Fact, as stated in the Reply, some of which appeared contradictory, I was unsure why the Respondent was challenging the business relationship of these parties in this manner. After hearing the evidence, I am even more perplexed as to why these matters have been pursued in Court as they were yesterday.

[15] After reviewing all of the evidence of these two witnesses respecting the business relationship and looking again at the various caselaw, there is no other conclusion that I would reach here except that these two workers are clearly independent contractors. In fact, if there was ever a clear-cut case for deciding such workers are not employees, this would be it. The workers are sole shareholders in each of the respective Appellant corporations and the Appellant corporations each hold 25 percent of the shares of DF. Although they have not committed the nature of their business relationship to writing, the evidence supports their clear intention to avoid an employee/employer arrangement and they had valid reasons for wanting to do this. They wanted to avoid the hourly regime that employees have to adhere to

pursuant to the *Employment Standards Act* in Ontario. Mr. Van Zanten would never have committed to this venture if that regime were superimposed upon them, and Mr. Skelton made it clear in his testimony that he had been an employee in the past and now wanted the freedom to enter such a venture as he was motivated by the opportunity for pocketing profits in such a specialized field where customers came looking for his expertise.

[16] The parties' intention to conduct the affairs of the workers as independent contractors was supported by the ensuing conduct of all parties in respect to how these work projects were carried out. In these appeals, it is more than a mere statement of intent by the parties respecting what their relationship was to be. The facts of this case support their stated intention and, unlike some cases, there is no conflicting opinion between the Appellants and the workers as to the nature of their relationship.

[17] If I understand the Respondent's argument on the factor of intention, counsel stated that the parties' intention was unclear, that there was no written contract, that the intent conflicts with the *Wiebe Door Services v. The Minister of National Revenue,* 87 D.T.C. 5025, factors and that the customers had no choice but to contact the workers directly because the Appellants had no phone. In response, and first, I think the parties' intention could not be clearer; second, that it makes no difference that there was no written contract as they clearly had a verbal agreement which they all appeared to understand and abide by; third, the factors of *Wiebe Door*, which I will canvas momentarily in my Reasons, support their stated intention; and fourth, the customers contacted the workers directly because of their expertise and, in fact, bypassed DF, with whom the customers had the contracts.

[18] The manner in which these parties have chosen to describe their business relationship is not determinative unless it reflects their relationship as it exists in reality. As I stated in my Reasons in the *National Capital Outaouais Ski Team v. The Minister of National Revenue,* [2007] T.C.J. No. 82, and I quote:

> [33] …one must return to the basic principles laid down by the Supreme Court in *Sagaz Industries.* More specifically, statements of intent in an agreement are not determinative unless they reflect the parties' actual legal relationship. Therefore, courts must evaluate all of the relevant facts and circumstances to determine if these reflect the intention that the parties originally stated. …

[19] Turning now to the four-in-one test as set out in *Wiebe Door* and the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001]

S.C.J. No. 61, these factors are control, tools, chance of profit/risk of loss and integration. The workers had absolute control over the when, where and how concerning the specifics of their job performances. There is no control that resides with the Appellants. In fact, the Appellants had no knowledge of the work projects, of the scheduling, of who the customers would be at any given time or the job cost. Nothing respecting the projects or the contracts flows through the Appellants' books.

[20] As case law has pointed out, it is not the actual control that is exercised, but the "right" to exercise that control that is important. But, even from that perspective, there is no evidence to support that the Appellants had any type of latent power or right to control these workers in any fashion. They acted as free agents in every aspect, unfettered in their approach to these work projects. It was DF, not the Appellants, which had the contracts with the customers. DF invoiced, and after paying its expenses, it disbursed profit to the workers, through the Appellant corporations, by direct deposit.

[21] The little reporting the workers did respecting the eventual project invoicing was directed again to DF and not the Appellants. If there was any control over the workers, it resulted from the customers' demands, which is typical of many entrepreneurial ventures. The Appellants have an independent legally recognized existence. The workers were the sole shareholders and directors in each pertinent Appellant corporation but that does not, however, in the appropriate circumstances, prevent them from putting on another hat that recognizes them as independent contractors.

[22] I think, if one steps back and looks objectively at the entire relationship between the Appellants and the workers, it is clear that the Appellants were conduits and a means to an end. As taxpayers, the parties were free to fashion their commercial affairs in a manner that best suited their needs. This was the vehicle they chose. The decision of Justice Tardif of this Court in *Groupe A.B.H. Assurances Inc. v. The Minister of National Revenue*, [1997] T.C.J. No. 1358, stated the following at paragraph 19:

> [19] Thus, it was shown that for all practical purposes the company could not dismiss any of the three individuals whose work is at issue in this case without endangering the company's very survival. The dismissal of an employee is the ultimate expression of the power to control. Without the power to dismiss or reprimand, the power to control becomes fictitious and ineffectual.

[23] These conclusions are equally applicable in these appeals. Mr. Van Zanten testified that the Appellants had no knowledge of the work projects so they could not possibly instruct or control the workers. The Appellants had no goodwill on their books. They were essentially shell corporations. Mr. Van Zanten stated that the Appellants would be, and I quote, “of no use” if the workers were not there. Even if the Appellants had the right to dismiss the workers, which the evidence did not support, what would be gained by that action? It would be so detrimental to the Appellants that their very existence would no longer be required. Where the workers went, so did the customers.

[24] As Justice Tardif stated, in the case I just quoted – without the Appellants having the power and ability to dismiss or reprimand these workers, control is simply a fiction and ineffectual.

[25] Although the Respondent suggested that since the Appellants and the workers claimed no expenses, this test did not favour the Appellants, I disagree as I believe this statement leads to an incorrect conclusion. First, taxpayers are “entitled” to claim expenses. They are not required to claim them. Second, it was DF and not the Appellants that owned and supplied all of the specialized fibre optic tools required by the workers to complete the projects. The workers had the usual tool boxes, but the Appellants had no assets, no tools, no equipment and no goodwill.

[26] Again, I disagree with the Respondent’s characterization of the profit/loss factor as well. From the workers’ viewpoint, if they worked more efficiently, it meant more money in their pockets. Mr. Skelton testified that this would be the reason he would not hire someone to replace him, as that would mean a loss of profit. The workers received no salary and no benefit package and, indirectly, they shared in the expenses of each work project because they were entitled to profit, if any, only after all associated expenses were paid. If there was no profit, they received no money on a project. This is far removed from the nature of an employee/employer relationship as it relates to this factor. Even from the Appellants’ perspective, there was no opportunity for profit or risk of loss because it operated as a conduit only for the flow of money.

[27] With respect to integration, the workers were not fully integrated with the Appellants. If the workers abandoned the Appellants, the customers would follow them because of their specialized skills. There is no evidence that any of the customers would choose to stay with the Appellants if the workers left. The customers were the customers of the workers or of DF even though, on the books of DF, it had the contracts with the customers.

[28] The workers are independent contractors based on all of the *Wiebe Door* factors and, in this sense, these factors support the stated intention of the parties to be independent contractors. The central question as defined by Justice Major in *Sagaz* was, and I quote, "…whether the person who has been engaged to perform the services is performing them as a person in business on his own account" or, as I like to state it simply, as "Whose business is it?" The workers were conducting business on their own or jointly in this venture and subjecting themselves to a chance of profit or a risk of loss, as the case may be. The profit/loss scenario is entirely dependent on the workers' own initiative unrelated in any way to the Appellants. There can be but one conclusion here, and that is that it was not the Appellants' business. As Mr. Van Zanten stated, and I believe I quote from his testimony: "We are the people running the business." The workers are independent contractors in every sense of the word and my conclusion is fully supported by the evidence and, to some extent, by the very Assumptions of Fact upon which the Minister relied. Accordingly, the appeals are allowed.

Signed at Vancouver, British Columbia, this 24th day of January 2011.

"Diane Campbell"

Campbell J.

Schedule "A"
Assumptions of Fact, 2010-659(CPP)

Business Information

(a) the Appellant operated a business of providing fibre optic technician services to a number of telecommunication service providers (the "Business");

(b) the Appellant provided its services to Direct Fibre Tek Solutions Inc. ("DFTS");

(c) DFTS's customers were Atrai Networks LP, Cogeco Cable Inc, Tandem Networks, Aecon Utilities, etc.;

(d) Andre Theriault is the 100% common shareholder of the Appellant;

(e) the shareholders and their percentages of holdings of DFTS were:

- 1663255 Ontario Inc. (Appellant) 25%
- 1663254 Ontario Inc. 25%
- 1649378 Ontario Inc. 25%
- 1649377 Ontario Inc. 25%;

(f) Andre Theriault controlled the day-to-day operations and made the major business decisions for the Appellant;

(g) the shareholders of the four shareholder corporations of DFTS, including the Worker, controlled the day-to-day operations and made the major business decisions for DFTS;

Control

(h) the Worker was not hired under a written agreement;

(i) the Worker's duties were to splice fibre optic wire for customers of DFTS;

(j) the Worker was highly skilled in his field;

(k) the Worker performed his duties at various locations in Eastern Ontario;

(l) the Worker was required to report to DFTS and their customers by email;

(m) the Worker's hours were based on DFTS's customers' needs;

(n) the Worker was required to work long hours if needed;

Ownership of Tools and Equipment

(o) the Worker, DFTS and their customers provided the Worker with all the tools, equipment and materials required to complete his work, at no cost to the Worker;

(p) the Worker, DFTS and it's customers were responsible for the maintenance and repairs of the tools and equipment used by the Worker;

Subcontracting Work and Hiring Assistants

(q) the Worker provided his services personally;

(r) the Worker did not hire substitutes or helpers;

Economic Elements

(s) the Worker was paid based on funds available in the Appellant's bank account;

(t) the Appellant determined the Worker's rate of pay;

(u) the Worker was paid by cheque;

(v) the Worker was not required to complete invoices in order to be paid;

(w) the Appellant did not provide the Worker with any bonuses, vacation pay or paid vacation;

(x) during the period, the Worker provided his services exclusively to the Appellant;

(y) the Worker did not incur any expenses in the performance of his duties;

(z) the Worker purchased supplies, which were reimbursed through DFTS's billing to its customers;

Responsibility for Investment and Management

(aa) the customers determined if work needed to be redone and covered the related costs;

(bb) the Appellant did not have any other workers performing the same services as the Worker;

(cc) the Worker reported his income from the Appellant as "Other income" and did not claim expenses on his personal income tax returns for the 2006 and 2007 taxation years, as per the following:

Year	Other Income
2006	$15,300
2007	$44,500

(dd) the Appellant reported the following "Management and administrative fees" as revenue on its Income Statement:

Year	Revenue
2006	$17,100
2007	$44,800

(ee) the Appellant reported the following "Management and administrative fees" as expenses on its Income Statement:

Year	Expense
2006	$15,300
2007	$44 ,500

(ff) the Worker did not charge the Appellant GST; and

(gg) the Appellant did not charge DFTS GST.

Schedule "B"
Assumptions of Fact, 2010-660(CPP)

Business Information

(a) the Appellant operated a business of providing fibre optic technician services to a number of telecommunication service providers (the "Business");

(b) the Appellant provided its services to Direct Fibre Tek Solutions Inc. ("DFTS");

(c) DFTS's customers were Atrai Networks LP, Cogeco Cable Inc, Tandem Networks, Aecon Utilities, etc.;

(d) Michael Skelton is the 100% common shareholder of the Appellant;

(e) the shareholders and their percentages of holdings of DFTS were:

- 1663255 Ontario Inc. 25%
- 1663254 Ontario Inc. (Appellant) 25%
- 1649378 Ontario Inc. 25%
- 1649377 Ontario Inc. 25%;

(f) Michael Skelton controlled the day-to-day operations and made the major business decisions for the Appellant;

(g) the shareholders of the four shareholder corporations of DFTS, including the Worker, controlled the day-to-day operations and made the major business decisions for DFTS;

Control

(h) the Worker was not hired under a written agreement;

(i) the Worker's duties were to splice fibre optic wire for customers of DFTS;

(j) the Worker was highly skilled in his field;

(k) the Worker performed his duties at various locations;

(l) the Worker was required to report to DFTS and their customers by email;

(m) the Worker's hours were based on DFTS's customers' needs;

(n) the Worker was required to work long hours if needed;

Ownership of Tools and Equipment

(o) the Worker, DFTS and their customers provided the Worker with all the tools, equipment and materials required to complete his work, at no cost to the Worker;

(p) the Worker, DFTS and it's customers were responsible for the maintenance and repairs of the tools and equipment used by the Worker;

Subcontracting Work and Hiring Assistants

(q) the Worker provided his services personally;

(r) the Worker did not hire substitutes or helpers;

Economic Elements

(s) the Worker was paid based on funds available in the Appellant's bank account;

(t) the Appellant determined the Worker's rate of pay;

(u) the Worker was paid by cheque;

(v) the Worker was not required to complete invoices in order to be paid;

(w) the Appellant did not provide the Worker with any bonuses, vacation pay or paid vacation;

(x) during the period, the Worker provided his services exclusively to the Appellant;

(y) the Worker did not incur any expenses in the performance of his duties;

(z) the Worker purchased supplies, which were reimbursed through DFTS's billing to its customers;

Responsibility for Investment and Management

(aa) the customers determined if work needed to be redone and covered the related costs;

(bb) the Appellant did not have any other workers performing the same services as the Worker;

(cc) the Worker reported his income from the Appellant as "Other income" and did not claim expenses on his personal income tax returns for the 2006 and 2007 taxation years, as per the following:

Year	Other Income
2006	$24,700
2007	$37,500

(dd) the Appellant reported the following "Management and administrative fees" as revenue on its Income Statement:

Year	Revenue
2006	$26,600
2007	$67,700

(ee) the Appellant reported the following "Management and administrative fees" as expenses on its Income Statement:

Year	Expense
2006	$24,700
2007	$67,500

(ff) the Worker did not charge the Appellant GST; and

(gg) the Appellant did not charge DFTS GST.

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