Docket: 2008-2935(EI),
2008-2936(CPP)

BETWEEN:

VLACHESLAV LEBOV,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on April 12, 2011, at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

Agent for the Appellant:	Harry Kopyto
Counsel for the Respondent:	Cenobar Parker and Darren Prevost

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JUDGMENT

The appeals pursuant to subsection 103(1) of the *Employment Insurance Act* and section 28 of the *Canada Pension Plan* are dismissed, and the decision of the Minister of National Revenue on the appeals made to him under section 92 of the *Act* and the determination of the Minister on the application made to him under section 27.1 of the *Plan* are confirmed.

Signed at Ottawa, Canada, this 19th day of April 2011.

"Campbell J. Miller"

C. Miller J.

Citation: 2011 TCC 216
Date: 20110419
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2008-2936(CPP)

BETWEEN:

VLACHESLAV LEBOV,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

C. Miller J.

[1] This is an *Employment Insurance/Canada Pension Plan* informal procedure case dealing with whether Mr. Lebov, the Appellant, was required to make the necessary source deductions pursuant to the application of Reg. 6(g) of the *Employment Insurance Regulations* (the "*EIR*") and section 34 of *Canada Pension Plan Regulations* (the "*CPPR*"). Both these provisions deal with the obligation of an employment agency to make source deductions under certain circumstances.

[2] In 2006, Mr. Lebov ran a placement agency as a sole proprietor under the operating name of TOPS. He would advertise for workers, and those who responded to his advertisements would be put in contact with his clients, who included production factories, recycling plants or construction companies. The worker would then go to the client where he or she was provided with work, normally on an hourly wage basis. The client would, at the end of the pay period, provide timesheets to the Appellant, who would invoice the client for the remuneration owed to the worker plus an amount for a referral fee. The Appellant would keep the fee and in turn write

a cheque to the worker. At year end, the Appellant provided the worker with T4A slips.

[3] As well as hearing Mr. Lebov's description of the arrangement, I also heard the evidence of two workers: one, Mr. Zubarev, who worked as a machine operator at a recycling plant at $10 dollars an hour; and two, Ms. Heridia who worked as a receptionist for a company called Rainbow at $9 dollars an hour. While I did not receive extensive evidence of the working arrangement, I heard enough to satisfy myself that the workers were certainly under the direction and control of the client, or were in a contract analogous to a contract of service. I heard no evidence to suggest otherwise or to rebut the Respondent's assumptions in this regard.

[4] Under these circumstances, do Reg. 6(g) of the *EIR*, section 7 of the *Insurable Earnings and Collection of Premiums Regulations*, and section 34 of the *CPPR* come into play? Those provisions read as follows:

From *EIR*:

> 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:
>
> …
>
> (*g*) employment of a person who is placed in that employment by a placement or employment agency to perform services for and under the direction and control of a client of the agency, where that person is remunerated by the agency for the performance of those services.

From *Insurable Earnings and Collection of Premiums Regulations*:

> 7. Where a person is placed in insurance employment by a placement or employment agency under an arrangement whereby the earnings of the person are paid by the agency, the agency shall, for the purposes of maintaining records, calculating the person's insurable earnings and paying, deducting and remitting the premiums payable on those insurable earnings under the Act and these Regulations, be deemed to be the employer of the person.

From *CPPR*:

> **34.**(1) Where any individual is placed by a placement or employment agency in employment with or for performance of services for a client of the agency and the terms or conditions on which the employment or services are performed and the remuneration thereof is paid constitute a contract of service or are analogous to a contract of service, the employment or performance of services is included in pensionable employment and the agency or the client, whichever pays the remuneration to the individual, shall, for the purposes of maintaining records and filing returns and paying, deducting and remitting contributions payable by and in respect of the individual under the Act and these Regulations, be deemed to be the employer of the individual.
>
> (2) For the purposes of subsection (1), "placement or employment agency" includes any person or organization that is engaged in the business of placing individuals in employment or for performance of services or of securing employment for individuals for a fee, reward or other remuneration.

[5] These regulations come into play if certain conditions are satisfied:

1. Did Mr. Lebov operate a placement agency? Yes he did.

2. Were the workers placed by Mr. Lebov with a client to perform services under the direction and control of the client or in a contract analogous to a contract of service? The workers were so placed.

3. Were the workers remunerated by Mr. Lebov, the placement agency? This is where the dispute lies.

[6] The Appellant, relying on Justice Woods decision in *Wegener and Emmerson O/A Director's Choice v. The Minister of National Revenue,*[1] ("*Director's Choice*") argues the workers were not remunerated by Mr. Lebov but, though he wrote the cheques, he did so solely as a conduit for the source of the remuneration, being the client. With respect, I disagree.

[7] I will go through the *Director's Choice* case to illustrate how different the circumstances in that case are from the case before me, and how it led to

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[1] 2005 TCC 362.

Justice Woods' conclusion that "both the form and substance of this arrangement is that the production companies, and not *Director's Choice*, remunerates the performance". I cannot reach the same conclusion as to the role of the placement agency in the circumstances before me.

[8] The differences from the circumstances in *Director's Choice* are as follows:

1. The production companies in *Director's Choice*, clients of the placement agency who hired the workers, took care of all payroll matters. In the case before me, the clients did not do that: Mr. Lebov acknowledged he looked after all the paperwork, that is part of what he did for the client to earn his fee.

2. In *Director's Choice*, the workers paid the agency a fee. There was no such payment in the case before me.

3. In *Director's Choice*, the workers entered a written agreement with the agency which authorized *Director's Choice* to withhold 15% of the earnings. *Director's Choice* ensured payment of the fee by requiring the client to send their cheques to both *Director's Choice* and to the workers. There is no such arrangement in the case before me. Mr. Lebov invoiced the client and simply turned around and paid the workers from the payment he received.

4. In *Director's Choice*, the client hired a payroll services company to issue T4A forms. In the case before me, Mr. Lebov issued the T4A forms. In *Director's Choice*, Justice Woods indicated: "… By issuing tax slips, the production companies acknowledged that they are paying remuneration…". There was no such implicit acknowledgment from Mr. Lebov's clients.

5. In *Director's Choice*, the workers signed a form that gave *Director's Choice* address instead of their own, effectively giving a direction for the remuneration to be mailed to *Director's Choice*. Again, no such direction was made by the workers in the case before me. It was always intended they would be paid by cheque from Mr. Lebov.

6. In *Director's Choice*, Justice Woods concluded "…the client is obligated to pay, deduct and remit premiums if the individual is engaged as an employee." She concluded the agency could not have remunerated

> the workers as effectively the remuneration had already been paid. No such obligation existed in the case before me and no remuneration could be found to have been paid to workers prior to Mr. Lebov writing the cheques.

[9] I conclude the circumstances are significantly different in *Director's Choice* than before me.

[10] The more recent case of *Graphic Assistants Inc. v. Canada*,[2] which also dealt with the application of Reg. 6(g) of the *EIR*, addressed the issue of what "remuneration" means in the context of payments made by a placement agency, concluding *prima facie* the person who actually pays the worker remunerates the worker. I would go further and suggest that to displace that *prima facie* conclusion requires evidence, as found in *Director's Choice*, that proves contractually someone other than the payor "remunerates" the worker.

[11] Section 34 of the *CPPR* is more detailed than the *EIR*, making it clear that either the employment agency or the client, "whichever pays the remuneration to the individual" shall be deemed to be the employer. The intent is clear. The provision is there to avoid workers slipping between the cracks. If the payment is made directly by the client to the employee, then these employment agency provisions do not come into play. However, if the client pays the employment agency, which in turn pays the worker, then these provisions make it clear that the employment agency is to make the necessary source deductions. On balance, I conclude that Mr. Lebov did not act simply as a conduit of the remuneration from the client to the worker, but in fact received payment from the client and himself turned around and paid the worker. This is "remuneration" as contemplated by the regulations in issue. To find otherwise would render these regulations meaningless, as ultimately the source of money for the payment to the workers will always be the client. Only in circumstances such as in *Director's Choice*, where the contract points clearly to a more direct connection between the client and the worker, can the employment agency avoid the obligation imposed on it by the regulations. I do not find such a direct link between the source of funds and the payment to the worker in this case. Here the payment came from the employment agency directly, not as any form of conduit of the client's payment.

[12] I conclude the arrangement falls squarely within the parameters of the *EIR* and *CPPR* and, therefore, I dismiss Mr. Lebov's appeals.

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[2] 2008 TCC 673.

Signed at Ottawa, Canada, this 19th day of April 2011.

"Campbell J. Miller"

C. Miller J.

CITATION:	2011 TCC 216
COURT FILE NO.:	2008-2935(EI) and 2008-2936(CPP)
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REASONS FOR JUDGMENT BY:	The Honourable Justice Campbell J. Miller
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APPEARANCES:

Agent for the Appellant:	Harry Kopyto
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