Docket: 2010-391(EI)

BETWEEN:

SYNER/PLUS INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on April 6, 2011, at Chicoutimi, Quebec.

Before: The Honourable Justice Gaston Jorré

Appearances:

Agent for the appellant: Yoland Martel

Counsel for the respondent: Simon Vincent

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal is dismissed and the decision of the Minister of National Revenue dated December 9, 2009, made under the *Employment Insurance Act* is confirmed.

Signed at Ottawa, Ontario, this 6th day of February 2012.

"Gaston Jorré"

Jorré J.

Translation certified true
on this 4th day of April 2012.

Erich Klein, Revisor

Citation: 2012 TCC 44
Date: 20120206
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BETWEEN:

SYNER/PLUS INC.,

Appellant,

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REASONS FOR JUDGMENT

Jorré J.

[1] The respondent determined that, during the periods from December 30, 2006, to April 19, 2008, and from October 26, 2008, to June 10, 2009, Jonathan Martel (the worker) did not hold insurable employment with the appellant (the payer).

[2] The respondent admitted that the worker was an employee of the appellant. However, he concluded that the worker's employment was excluded because the appellant and the worker would not have entered into a similar contract of employment if they had been dealing with each other at arm's length.

[3] The appellant appealed the Minister's decision.

[4] Yoland Martel (Mr. Martel) is the father of Jonathan Martel.

[5] The appellant's majority shareholder was 9159-0125 Québec inc. Mr. Martel was the appellant's second shareholder.[1]

[6] Mr. Martel was the sole shareholder of 9159-0125 Québec inc.

[1] According to Mr. Martel's testimony, his former spouse, the worker's mother, was also a shareholder of the appellant in 2006, the year in which the period at issue began. This does not affect in any way the existence of a non-arm's length relationship. Mr. Martel separated from his spouse at the end of December 2006 (Exhibit A-1, sixth last page).

[7] The appellant did not dispute the non-arm's length relationship.

[8] The relevant provisions of the *Employment Insurance Act* are the following paragraphs of section 5:

> (2) Insurable employment does not include
>
> . . .
>
> (*i*) employment if the employer and employee are not dealing with each other at arm's length.
>
> (3) For the purposes of paragraph (2)(*i*),
>
> (*a*) the question of whether persons are not dealing with each other at arm's length shall be determined in accordance with the *Income Tax Act*; and
>
> (*b*) if the employer is, within the meaning of that Act, related to the employee, they are deemed to deal with each other at arm's length if the Minister of National Revenue is satisfied that, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[9] The appellant did not dispute that it was related to the worker within the meaning of the *Income Tax Act*.

[10] With respect to the role of the Court in applying paragraph 5(3)(*b*), the principles are summarized well by Justice Bédard in *Lavoie v. M.N.R.*[2] at paragraphs 7 to 9:

> 7 The Federal Court of Appeal has repeatedly defined the role conferred on Tax Court of Canada judges by the Act. That role does not permit the judge to substitute his or her discretion for the Minister's, but does involve an obligation to "verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after doing so, . . . decide whether the conclusion with which the Minister was "satisfied" still seems reasonable" (see *Légaré v. Canada (Minister of National Revenue - M.N.R.*), [1999] F.C.J. No. 878 (QL), at paragraph 4).
>
> 8 In other words, before deciding whether the Minister's conclusion still seems reasonable to me, I must verify, in light of the evidence before me, whether the

[2] 2010 TCC 580.

> Minister's allegations are in fact correct, having regard to the factors set out in paragraph 5(3)(*b*) of the Act. At issue, then, is whether appellant Lavoie and the payer would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.
>
> 9 Appellant Lavoie had the burden of proving that the Minister did not exercise his discretion in accordance with the principles that apply in this regard, essentially, that the Minister did not examine all of the relevant facts or failed to have regard to all of the facts that were relevant.

[11] Accordingly, having heard all of the evidence, I must decide if the Minister's conclusion that the payer and an arm's length person would not have entered into a substantially similar contract of employment still seems reasonable to me.

[12] In making his decision, the Minister relied on the following assumptions of fact:[3]

[TRANSLATION]

(a) The payer was incorporated on February 1, 1999;
(b) The appellant operated a business that specialized in manufacturing parts for heat exchangers, in heat exchanger maintenance, cleaning and repair, as well as in the manufacture of biodegradable products used for heat exchanger maintenance;
(c) The appellant operated year-round;
(d) The appellant's clients were mainly Abitibi Consolidated, Alcan and Louisiana Pacific;
(e) The appellant's sales figures for the periods at issue were as follows:

Fiscal year ending on January 31	**2007**	**2008**	**2009**
Sales figures	$168,084	$124,129	$79,715
Gross profit	$74,081	$53,733	$33,650
Net profit	$36,174	$13,880	$17,416

(f) The appellant's administrative office was located in St-Bruno, at the shareholder's parents' house, and the workshop for the cleaning and manufacture of products was in Hébertville;
(g) The workshop is a 50- by 50-foot garage and is located 15 km from the office;
(h) The appellant employed only the shareholder and the worker full time; the other workers were on call;
(i) These other workers worked mainly at the plant, during machinery stoppages;
(j) The worker was born on March 2, 1990; he was therefore 16 during the first period at issue;

[3] Reply to the Notice of Appeal, paragraph 6.

(k) The appellant's busiest time is from March to November, but the worker was hired on December 30, 2006, and laid off between April 20 and October 25, 2008;
(l) The worker worked mostly at the workshop cleaning small heat exchangers with the cleaning products because he had to be 18 years old to work at the plant;
(m) The worker stated that he had not done solid state welding, while the appellant's shareholder stated that he had taught the worker to do this type of work and that he had been welding since he was 14 years old;
(n) The worker also produced cleaning products because he knew the manufacturing secret;
(o) Making 20 45-gallon drums of the cleaning product can take a whole day, and for some exchangers 1 or 2 drums are required; for others, 8;
(p) The worker estimates that he worked alone in the workshop 60% of the time and the rest of the time with the appellant's shareholder, while the shareholder estimates that it was fifty-fifty;
(q) The appellant cannot estimate the number of plant stoppages during the periods at issue;
(r) The worker indicated that he had worked 20 to 40 hours per week, but, according to the appellant, he worked 40 hours per week on average;
(s) The worker was paid for the hours worked;
(t) During the first work period, the worker was paid $25 per hour, since he had more responsibilities as the appellant's shareholder was in the midst of divorce proceedings and his mind was not on work, and the on-call employees were paid between $16 and $18 per hour;
(u) During the second work period, the worker was paid $16.50 per hour;
(v) Neither party was able to explain why the worker's pay for February 17, 2007, was for 50 hours at $8 per hour;
(w) Once, the worker was paid for 13 pay periods at the same time, and another time, for 10 pay periods, because the appellant's shareholder did not do the accounting, while the other workers were paid normally;
(x) A gross bonus of $7,000 was paid to the worker for the work performed while the appellant's shareholder was in the midst of divorce proceedings, but the worker supposedly owed the net amount, $4,927.97, to his father, the appellant's shareholder; the worker thus handed his bonus over to his father, and it was ultimately used to pay the appellant's accountant;
(y) All of the appellant's employees were laid off at the end of March 2009, while the worker continued to work until June 10, 2009;
(z) The appellant stated that it did not rehire the worker; however, the file contains a product sale invoice dated August 5, 2009, that is, after the periods at issue, on which it is indicated that the sale was made by the worker.

[13] Mr. Martel testified as did Lyne Courcy, an appeals officer at the Canada Revenue Agency. The worker did not testify.

[14] At the start of the periods at issue, the worker was 16 year old, and at the end he was 19 year old.[4]

[15] The appellant is Mr. Martel's company. Mr. Martel founded it, runs it and is the person who works there most regularly. Apart from Mr. Martel's son, who is the worker, all employees work there irregularly, when the company needs their services. This is due to the fact that the company's activity varies a great deal depending on its clients' needs.[5]

[16] Mr. Martel explained that, after his separation from his spouse in December 2006, he went through a very difficult time during which he was unable to work normally and relied a great deal on his son, the worker.

[17] I do not doubt that the worker helped his father a great deal and that he worked hard when there was work to do.

[18] However, while the other, unrelated, employees were paid regularly, the worker was paid very late twice.

[19] Although Mr. Martel testified that he had no recollection of any such belated payments, the appellant did not satisfy me that the Minister was wrong in his assumption that, on two occasions, the worker's salary was paid very late.

[20] The first time, on March 30, 2007, the worker was paid for 13 weeks at the same time; the second time, on June 28, 2007, he received his salary for 10 weeks at the same time.[6]

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[4] Exhibit I-1, Tab B-5, second page.

[5] A large part of the work is done during plant closures, which is the only time when work can be done on heat exchangers.

[6] Although, in a statutory declaration, the worker stated that he was paid every two weeks (Exhibit I-1, Tab B-19, third page), in a telephone interview on November 27, 2009, the worker remembered having been paid for 13 pay periods at once on one occasion and for 10 pay periods at once on another (beginning of Exhibit I-1, Report on an Appeal, page 3, paragraph 18). In coming to this conclusion, the Minister also relied on the following:

(a) the payer's statement for its account with the caisse populaire (Exhibit I-1, Tab B-34, page 2), which shows an over-the-counter withdrawal of $7,505.81 on March 30, 2007, as well as the transaction record for the worker's account (Exhibit I-1, Tab B-36, page 1), which shows a no-book deposit of $7,505.81 made on the same day;

(b) the payer's bank statement (Exhibit I-1, Tab B-35, page 2), which shows a payment by cheque of $5,773.70 made on June 28, 2007, as well as the transaction record for the worker's account (Exhibit I-1, Tab B-36, page 3), which shows a no-book deposit of $12,711.40 made on June 27, 2007 (the worker wrote a certified cheque for $15,500 on the same day), and the deposit slip (Exhibit I-1, Tab B-37), on which the amount of $5,773.70 appears as part of the total of $12,711.40;

(c) the answers provided to the Minister by the accountant representing the payer (Exhibit I-2, Tab D, page 2), who wrote that, for the period from [TRANSLATION] "1/4/07 to 9/6/07", 10 pays were received at the same time in accordance with a decision by Mr. Martel.

[21] An arm's length employee would not accept such delays when the other employees are paid in a normal fashion.

[22] In addition, the other employees were paid by the hour, but the worker was paid a fixed salary for the weeks he worked despite the fact that his hours of work varied a great deal.[7]

[23] While the Court recognizes that the worker was a great help to Mr. Martel during a difficult time, an arm's length third party and the payer would not have negotiated such a contract providing for a fixed salary regardless of any such variation in hours.

[24] These two factors alone are sufficient for me to come to the conclusion that the Minister's decision still seems reasonable to me.[8]

[25] Accordingly, I must dismiss the appeal.

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[7] According to the worker's statutory declaration, he was paid for a fixed work week of 20 or 40 hours, regardless of the actual number of hours worked. The hours worked could vary a great deal: he could work 90 hours one week and 10 hours the next (Exhibit I-1, Tab B-19, third page). However, in the telephone interview on November 27, 2009, the worker stated that he had worked between 20 and 40 hours per week, and no more (Exhibit I-1, page 3, paragraph 18). Given Mr. Martel's testimony on the important role the worker had played in the business after his separation, I have no doubt that the worker's hours worked varied a great deal and were sometimes very long. See, for example, pages 15 and 16 of the transcript, where Mr. Martel says that his son became his right hand and that they worked a great deal, including evenings and weekends.

[8] I note that there are a number of anomalies in the evidence. In Exhibit I-1, at Tabs B-5, B-6 and B-16, there are employment insurance benefit claims filed by the worker on July 9, 2008, November 17, 2008, and June 22, 2009, respectively. In the second claim, it is indicated that his last day of work was October 31, 2008. However, in the third claim, it is indicated that the first day of work was July 27, 2008, and that the last day of work was June 10, 2009. The Record of Employment at Tab B-15 of Exhibit I-1 also indicates July 27, 2008 as the first day of work. The appellant did not dispute that October 26, 2008, was the day he resumed working.

The first claim states that the worker's hourly rate of pay was $25; the second claim states that the worker was paid $750 for 52 hours per week; and the third shows an hourly rate of $16.50.

There is also the issue of the $7,000 bonus paid to the worker on July 31, 2008, that is, about 3 1/2 months after the end of the first work period and 3 months before the worker resumed working, but only a few days after July 27, 2008, the resumption date according to the third employment insurance claim. Mr. Martel testified that he had told his son that he was going to compensate him for all the help he had given him during the period following his separation; according to his testimony, the gross bonus of $7,000 was in recognition of all that work. However, the net bonus of $4,927.97 after deductions was paid by cheque number 241 made out to the worker (Exhibit I-1, Tab B-20, on the back of the cheque, which is difficult to read), but this cheque was deposited in the account of Les services financiers Gestrix inc., the firm that does the payer’s accounting (Exhibit I-1, Tab B-21, page 3). Mr. Martel testified that his son had given him the cheque to repay money that his son had borrowed from him. In the telephone interview on November 27, 2009, the son said that he had received the $7,000 bonus by way of thanks for his good work and that he had given that money to his father because he owed him money. However, in his statutory declaration, the son said: [TRANSLATION] "I know that $7,000 was deposited in my account, but I don't know why. I believe that it is the total of all the $100 withdrawals that I had been making at the bank every payday and putting in a safe at home in case of financial difficulty and that I finally decided to deposit. It could also be an error by the accountant. I don't know."

Signed at Ottawa, Ontario, this 6th day of February 2012.

"Gaston Jorré"

Jorré J.

Translation certified true
on this 4th day of April 2012.

Erich Klein, Revisor

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APPEARANCES:

Agent for the appellant:	Yoland Martel
Counsel for the respondent:	Simon Vincent

COUNSEL OF RECORD:

For the appellant:

Name:

Firm:

For the respondent: Myles J. Kirvan
Deputy Attorney General of Canada
Ottawa, Ontario