Docket: 2012-1811(EI)

BETWEEN:

KULWANT KAUR SMAGH,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of *Roop Singh Smagh 2012-1812(EI)* on November 30, 2012 at Kelowna, British Columbia.

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

Counsel for the Appellant:	Pamela Smith-Gander
Counsel for the Respondent:	Jack Warren

JUDGMENT

The appeal is dismissed and the decision of the Minister of National Revenue is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Sidney, British Columbia, this 11th day of January 2013.

"D.W. Rowe"

Rowe D.J.

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Docket: 2012-1812(EI)

BETWEEN:

ROOP SINGH SMAGH,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
Kulwant Kaur Smagh 2012-1811(EI) on November 30, 2012,
at Kelowna, British Columbia.

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

Counsel for the Appellant:	Pamela Smith-Gander
Counsel for the Respondent:	Jack Warren

JUDGMENT

The appeal is dismissed and the decision of the Minister of National Revenue is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Sidney, British Columbia, this 11th day of January 2013.

"D.W. Rowe"

Rowe D.J.

Citation: 2013 TCC 9
Date: 20130111

Dockets: 2012-1811(EI)
2012-1812(EI)

BETWEEN:

KULWANT KAUR SMAGH,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

and

BETWEEN:

2012-1812(EI)

ROOP SINGH SMAGH,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Rowe D.J.

[1] The appellant Kulwant Kaur Smagh (Kulwant Kaur) and the appellant Roop Singh Smagh (Roop Singh) each appealed from a decision – dated April 12, 2012 – by the Minister of National Revenue (the "Minister") in which the employment of

Kulwant Kaur with Roop Singh for the period June 22, 2009 to September 11, 2009 was held not to constitute insurable employment because the Minister was not satisfied pursuant to paragraph 5(2)(i) of the *Employment Insurance Act* (the "*Act*") that a substantially similar contract of employment would have been entered into if the parties had been dealing with each other at arm's length.

[2] Counsel agreed the appeals be heard together and a certified Punjabi to English, English to Punjabi interpreter – Satpal Singh Gill – was required to interpret only a few phrases during the testimony of Roop Singh.

[3] Roop Singh testified he is engaged in the construction business in Osoyoos, British Columbia. Previously, he had been a fruit grower and operator of a packing house carrying on business - in Oliver, B.C. - in a partnership with his brother since 1994. During the relevant period, he operated Sun Star Fruit Packers (Sun Star) as a sole proprietorship. In 1997, his wife – Kulwant Kaur – began working for that entity and - in 2001 - there was an audit by the predecessor of Canada Revenue Agency (CRA). It was determined that she was engaged in insurable employment with the partnership. Roop Singh stated that one day between 2000 and 2004, Kulwant Kaur took his truck to drive their son to school because he had missed the bus. She was involved in an accident with a motorcyclist. Unfortunately, there was no insurance on the truck and she had not spoken with Roop Singh prior to driving it. The motorcyclist made a claim for damages which proceeded slowly but by 2008 the time had come for the matter to be resolved. After some negotiation, it was agreed the damages attributable to the accident were in the sum of $17,836.00. Roop Singh stated that in accordance with the business policies and procedures of the Insurance Corporation of British Columbia (ICBC), he was required to pay that amount – on October 3, 2008 – as failure to do so would have resulted in the cancellation of his British Columbia operator's license. He discussed the situation with Kulwant Kaur and she accepted responsibility for the accident and for having driven the uninsured truck without his knowledge and permission. She proposed that she continue to work for the orchard/packing house business and that amounts could be taken from her net pay until Roop Singh had recovered the full cost of the settlement paid to ICBC. Roop Singh stated it was not unusual for him to advance funds to a grower or a worker and to be repaid later in the year when the grower sold his fruit or the worker received the balance of his or her earnings at the end of the season. Filed as Exhibit A-1, a photocopy of a Business Account Statement (Statement) displayed copies of cheques issued by Roop Singh on the account of Sun Star to a grower – Sidhu – in the sums of $1035.00 and $20,000.00, respectively, both dated January 2, 2009. The smaller cheque was in payment of fruit purchased from Sidhu in 2008 and the larger cheque was an advance against fruit purchases during the 2009 season. Filed as

Exhibit A-2, were two photocopied Statement pages with various cheques issued on the business account to several individuals in various amounts. Cheques written on August 27, 2009 and August 28, 2009 - in the sums of $1000.00 and $710.00, respectively - to two workers represented an advance against future earnings. A cheque in the sum of $10,000 – dated September 1, 2009 – was an advance payment to a cherry grower. On another page of a Statement - Exhibit A-3 - there are copies of cheques written by Roop Singh to two individuals who had worked for him earlier and were employed again for the 2009 season. A photocopied sheet of several cheque stubs was filed as Exhibit A-4. Roop Singh stated the entry dated October 9, 2005, recorded a loan of $5,000.00 to Sidhu who had worked for him for 10 years and needed money to make a deposit on the purchase of his own orchard. A stub – dated November 6, 2007 – recorded a cheque in the sum of $15,765.00 issued to Gill - an apple grower - as an advance against future delivery of product. Roop Singh stated he recorded the hours worked by Kulwant Kaur and a payroll sheet – Exhibit A-5 – had been prepared which showing gross earnings for the relevant period in the sum of $10,800.00, based on an hourly rate of $15.00. The net earnings in the sum of $8,709.10 were retained by Roop Singh and applied toward the amount owed to him in relation to the ICBC settlement payment. He stated he had told the interviewer at the CRA Penticton office that Kulwant Kaur's hours of work had been recorded. In 2009, the fruit growing season ended on September 11 and all workers were laid off. There was a maximum of 18 to 20 workers employed during the season to pick apples, cherries, grapes and plums but only 12 or 13 were required to harvest peaches. Roop Singh stated Kulwant Kaur worked as a Supervisor and had various responsibilities over and above that of an ordinary worker. She also had a British Columbia driver's licence which he understood would have been suspended had he not made the payment to ICBC.

[4] In cross-examination by counsel for the respondent, Roop Singh stated he had taken the position at the outset that any damages paid by him as a result of the accident would result in a debt owed to him by Kulwant Kaur. He identified a Statement – Exhibit A-6 – and stated that the entry dated October 3 - cheque #461 in the sum of $17,836.00 - represented the payment to ICBC. He considered that in making the payment he was advancing a loan to Kulwant Kaur and, although she was his wife, she was also a longtime employee who agreed to continue to work for his business until the debt was repaid. He agreed that no interest was charged on the loan but he had never charged interest on any loan to a worker or grower. He stated that a handwritten time sheet – Exhibit A-7 - had been maintained for Kulwant Kaur showing she had worked a total of 720 hours during the relevant period and that a 60-hour to 70-hour work week was not abnormal in the orchard industry. Also, it was normal to work every day during the relatively short season. Roop Singh stated he

sold the packing house in 2010 and Kulwant Kaur went to work for another employer and continued to pay him a certain sum from each pay cheque in order to retire the balance of the debt. Roop Singh stated it was common in the industry to advance payment to reliable growers and also to trusted workers. He advanced the sum of $1000.00 – Exhibit A-2 - to a worker – Singh – about 15 days before the end of the season when final payment – in the ordinary course – otherwise would have been due. A cheque in the sum of $1200.00 – Exhibit A-3 – was an advance to a worker for pruning, an activity that would not be undertaken until the winter months. Workers were not paid any overtime. Roop Singh stated he does not recall the extent of the questions asked by the interviewer at the CRA office in Penticton and does not remember discussing the subject of loans to other workers. He stated it is normal in the industry to make advances to workers – if requested – and to pay all remaining wages at the end of the season. Except for itinerant workers who pick fruit for a day or two – or for a few hours - all other wages are paid by cheque. A worker who acted as Foreman earned $13.00 an hour and other workers were paid either $10.00 or $11.00. Some workers – pickers - were paid on the basis of piecework. Roop Singh stated his arrangement with Kulwant Kaur concerning the monies owed to him was verbal as were all other transactions whereby loans or advances were made to growers or workers. On rare occasions, he had advanced a worker a small sum and was out of pocket when that person did not show up for work the next morning. Roop Singh acknowledged that although people borrowed money from him for various reasons, he would not have paid – directly - a third-party debt for any other worker on the basis that he would be repaid by retaining the worker's net wages from ongoing employment.

[5] Kulwant Kaur Smagh did not testify. Both appellants closed their case.

[6] The respondent did not call any evidence.

[7] Counsel for the appellants submitted the evidence disclosed that the factors considered by the Minister pursuant to the relevant provision of the *Act* did not reveal any marked departure from a non-arm's length relationship with a non-related worker with respect to remuneration paid, the terms and conditions of employment and its duration, and the nature and importance of the work performed. Counsel acknowledged that the financial arrangement between Roop Singh and Kulwant Kaur as both husband and wife and as employer and employee was exceptional, perhaps unique in this field of jurisprudence. However, they had concluded their agreement after having discussed the matter of the payment by Roop Singh to ICBC because the accident had subjected him to liability for damages in his capacity as registered owner of the vehicle driven by Kulwant Kaur. Without paying the amount demanded

by ICBC, both their driver's licences could have been subject to suspension and the impact on the business and their personal lives would have been substantial. Counsel submitted there is no doubt that Kulwant Kaur was employed during the relevant period and had been so employed for about 15 seasons either by her husband or – earlier – by her husband and her brother-in-law when the business was operated as a partnership. Counsel submitted that having regard to all the circumstances of the employment, the origin of the debt to Roop Singh and the method of repayment by Kulwant Kaur from her wages should not exclude her from the category of insurable employment. Counsel referred to the evidence where it was common for Roop Singh to advance money not only to reliable growers but also to employees who had worked for him earlier. He even advanced money to a worker months before the pruning work would be performed. He did not charge any interest to any borrower and all loans were verbal in nature.

[8] Counsel for the respondent conceded the employment of Kulwant Kaur by Roop Singh was genuine during the relevant period and that the work was performed. Further, he advised the Minister does not take issue with the remuneration of $15.00 per hour since Kulwant Kaur was an experienced worker who carried out supervisory duties. Except for the loan-repayment agreement between the parties, the other terms and conditions of employment were consistent with non-related workers as was the duration of the work which was dictated by the usual cycle of growing and harvesting common to the fruit growing industry in that area. Counsel acknowledged the evidence did not disclose anything abnormal concerning the nature and importance of the work performed by Kulwant Kaur. However, the testimony of Roop Singh was unequivocal that he would not have entered into an arrangement with any non-related worker whereby he would have paid off – directly – a debt owed to a third party and received repayment by retaining money from earned net wages. Counsel submitted the Minister was entitled to decide that the unusual financial arrangement between Roop Singh - as a related employer - and his wife Kulwant Kaur as employee - was sufficiently aberrant to disqualify her from insurable employment. In counsel's view of the evidence, it was tantamount to a trump card. In effect, it constituted an overarching factor that, having regard to the totality of the circumstances of the employment, affected the nature of the employment relationship to the extent that her employment was not insurable. Counsel submitted that the relevant jurisprudence applied to the facts in the within appeals required each decision issued by the Minister to each appellant to be confirmed.

[9] The relevant provisions of the *Act* are paragraphs 5(1)(*a*) and 5(2)(*i*) and subsection 5(3) which read as follows:

5. (1) Subject to subsection (2), insurable employment is

(*a*) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

…

(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.

[10] In the case of *Porter v. Canada (Minister of National Revenue - M.N.R.)*, [2005] T.C.J. No. 266; 2005 TCC 364, Campbell, J. reviewed the comments of Justice Archambault in *Bélanger v. Canada (Minister of National Revenue - M.N.R.)*, 2005 CarswellNat 3971; 2005 TCC 36 and those of Justice Bowie in *Birkland v. Canada (Minister of National Revenue - M.N.R.)*, [2005] T.C.J. No. 195; 2005 TCC 291 wherein both discussed the function of this Court in the context of the decision of the Federal Court of Appeal in *Légaré, supra,* and subsequent decisions of that Court. At paragraphs 12 and 13 of her Judgment, Justice Campbell stated:

12 The Tax Court's mandate, in Employment Insurance cases as set out in the cases of Légaré and Pérusse, was recently reaffirmed by Letourneau J. in *Livreur Plus Inc. v. Canada*, [2004] F.C.J. No. 267 at paragraphs 12, 13 and 14:

12. As already mentioned, the Minister assumed in support of his decision the existence of a number of facts obtained by inquiry from workers and the business he considered to be the employer. Those facts are taken as proven. It is for the person objecting to the Minister's decision to refute them.

> 13. The function of a Tax Court of Canada judge hearing an appeal from the Minister's decision is to verify the existence and accuracy of those facts and the assessment of them by the Minister or his officials, and after doing so, to decide in light of that whether the Minister's decision still seems to be reasonable: *Légaré v. Canada (Minister of National Revenue -- M.N.R.),* [1999] F.C.J. No. 878; *Pérusse v. Canada (Minister of National Revenue -- M.N.R.),* [2000] F.C.J. No. 310; *Massignani v. Canada (Minister of National Revenue),* 2003 FCA 172; *Bélanger v. Canada (Minister of National Revenue),* 2003 FCA 455. In fact, certain material facts relied on by the Minister may be refuted, or the view taken of them may not stand up to judicial review, so that because of their importance the apparent reasonableness of the Minister's decision will be completely destroyed or seriously undermined.
>
> 14. In exercising this function the judge must accord the Minister a certain measure of deference, as to the initial assessment, and cannot simply substitute his own opinion for that of the Minister unless there are new facts or evidence that the known facts were misunderstood or wrongly assessed*: Pérusse v. Canada (Minister of National Revenue - M.N.R.) supra*, paragraph 15.

> 13 In summary, the function of this Court is to verify the existence and accuracy of the facts relied upon by the Minister, consider all of the facts in evidence before the Court, including any new facts, and to then assess whether the Minister's decision still seems "reasonable" in light of findings of fact by this Court. This assessment should accord a certain measure of deference to the Minister.

[11] The Amended Reply to each Notice of Appeal (Amended Reply) – at paragraph 7(n) of the assumptions of fact states:

> . . .
>
> 7. n) the Appellant did not track the Worker's hours worked;
>
> . . .

[12] I am satisfied that Roop Singh did record the hours worked by Kulwant Kaur and that the handwritten foolscap sheet – Exhibit A-7 – is accurate. Other than that, the assumptions in each Amended Reply remain intact.

[13] The fact situation in these appeals is peculiar and odds are it will not re-occur in the context of an appeal from a decision by the Minister pursuant to the relevant provisions of the *Act*.

[14] The remuneration was reasonable in view of Kulwant Kaur's experience and responsibilities and so were the majority of the terms and conditions of her employment. The duration was dictated – as usual – by the fruit season and she was laid off at the same time as unrelated workers. All her net earnings were retained by Roop Singh and applied against the agreed amount of her debt to him. During the season, some non-related workers received a loan or an advance but final settlement and payment of the balance of wages took place at the end of the season, a practice common to the industry in that region. During the relevant period, there was no significant variance with respect to the nature and importance of the work performed by Kulwant Kaur when compared with non-related workers.

[15] When the employer and employee are deemed to be related for purposes of the *Act*, the default position is that the employment is not insurable unless the Minister deems them to be dealing at arm's length notwithstanding their related status.

[16] In the case of *Docherty v. Minister of National Revenue*, [2000] T.C.J. No. 690, I commented – at paragraph 25 as follows:

> [25] The template to be utilized in making a comparison with arm's length working relationships does not require a perfect match. That is recognized within the language of the legislation because it refers to a "substantially similar contract of employment". Any time the parties are related to each other within the meaning of the relevant legislation, there will be idiosyncrasies arising from the working relationship, especially if the spouse is the sole employee or perhaps a member of a small staff. However, the object is not to disqualify these people from participating in the national employment insurance scheme provided certain conditions have been met. To do so without valid reasons is inequitable and contrary to the intent of the legislation.

[17] The debt owed by Kulwant Kaur to Roop Singh and the subsequent agreement between them concerning the method of repayment was inextricably bound up in their employer/employee relationship. If Kulwant Kaur had borrowed the amount needed to pay ICBC from a financial institution and - even if Roop Singh had to co-sign the loan - she could have made payments directly to the lender in specific amounts during a certain term. In this way, the participation of Roop Singh would have been primarily as a husband even though the source of funds to repay the loan to the financial institution during the relevant period would have been wages earned

by her as an employee of his sole proprietorship. However, she could have retained control over her earnings. I appreciate that Roop Singh found himself between the proverbial rock and a hard place but the nature of their agreement did not constitute a mere idiosyncrasy. Instead, it constituted the core of their employment relationship. Roop Singh was forthright when he acknowledged that he would not have entered into a similar loan and repayment arrangement with any non-related worker. His generous nature caused him to make non-interest-bearing loans to growers and to advance money to reliable workers against future wages. He loaned a substantial sum of money - $5000.00 - to an employee who wanted to buy an orchard. The arrangement between Roop Singh and Kulwant Kaur does not fit within the pattern of the loans made - or advance wages paid - to non-related workers and other parties. That agreement was unique and would not have existed if the parties had not been related. Would a non-related worker have agreed that an employer could apply every cent of net wages - earned from 720 hours of work – to discharge a debt? To ask the question is to answer it.

[18] The appellants acted in good faith to resolve a thorny issue. The work was performed as it had been in the past. Roop Singh sold his orchard and packing house business in 2010. Kulwant Kaur found employment with another fruit grower and paid him regularly from her earnings to reduce the balance of her debt.

[19] Were I clothed with the jurisdiction to decide these appeals *de novo*, I may have been tempted to find in favour of the appellants in light of their longstanding employer/employee relationship and the otherwise normal nature of the employment during the relevant period in the context of the orchard industry. Because the within fact situation constituted a one-off, that alone could have fuelled such an inclination. However, these musings are simply speculative, of the sort indulged in by those armchair quarterbacks or wannabe skips who – from the comfort of their couches – would have targeted a different receiver in the dying seconds of the 4th quarter or called a different shot in the 10th end of a Brier final.

[20] Having regard to the evidence and the relevant jurisprudence, I am satisfied each of the decisions issued by the Minister is reasonable. There was no evidence of bad faith or any consideration of irrelevant factors. The Minister did not fail to take into account all of the relevant circumstances. The Minister assumed the worker's hours had not been recorded but there was no evidence that the handwritten record had been produced earlier. In any event, that matter in itself is not significant and does not affect the validity of the decisions issued by the Minister which in light of all the evidence remain reasonable. I cannot find any valid reasons to support a different conclusion.

[21] Each decision of the Minister is confirmed and each appeal is dismissed.

Signed at Sidney, British Columbia, this 11th day of January 2013.

"D.W. Rowe"

Rowe D.J.

CITATION:	2013 TCC 9
COURT FILE NOS.:	2012-1811(EI) and 2012-1812(EI)
STYLE OF CAUSE:	KULWANT KAUR SINGH AND HER MAJESTY THE QUEEN ROOP SINGH SMAGH AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Kelowna, British Columbia
DATE OF HEARING:	November 30, 2012
REASONS FOR JUDGMENT BY:	The Honourable D.W. Rowe, Deputy Judge
DATE OF JUDGMENT:	January 11, 2013

APPEARANCES:

Counsel for the Appellant:	Pamela Smith-Gander
Counsel for the Respondent:	Jack Warren

COUNSEL OF RECORD:

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