

Docket: 2017-3267(IT)I

BETWEEN:

NAZER NSM MARAR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 19, 2018, at Windsor, Ontario
Before: The Honourable Mr. Justice Randall S. Boccock

Appearances

For the Appellant:

The Appellant himself

Counsel for the Respondent:

Dominik Longchamps

JUDGMENT

IN ACCORDANCE WITH the Reasons for Judgment attached the Appeal from reassessment made under the *Income Tax Act* for the Appellant's 2014 taxation year is dismissed, without costs.

Signed at Ottawa, Canada, this 18th day of December 2018.

“R.S. Boccock”

Boccock J.

Citation: 2018TCC259
Date: 20181218
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NAZER NSM MARAR,

Appellant,

and

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REASONS FOR JUDGMENT

Bocock J.

I. INTRODUCTION

[1] Mr. Marar is an interpreter and translator. He earns his living through the translation of documents, testimony, interviews and interrogations. In 2014, he reported \$43,841.73 of professional income from his translation/interpretation business (the “Business”). He also reported \$18,838.80 as other employment income. The reported professional income was received from a variety of users of his Business: courts of all levels, various service agencies, the RCMP and Canadian Mental Health Association. The reported employment income was received from only one payor: Canadian Border Services Agency (CBSA).

[2] Mr. Marar also claimed the Canada Employment non-refundable tax credit (CETC) on the basis of the CBSA sourced income (the “CBSA Work”). The Minister reassessed Mr. Marar, denied the employment source for the CBSA Work income and reclassified it as professional income from his Business. On the Minister’s part, she consistently disallowed the CETC and assessed for the increased, but unremitted additional CPP contributions on the self-employed earnings. Mr. Marar appeals that entire decision. Therefore, the sole issue before the Court is whether the amounts received from the CBSA Work were employment income or professional income. The CETC and CPP will be informed by that decision.

II. FACTS

[3] There are not many facts in dispute. The CBSA issued a T1204 -- Government Service Contract Payments information slip reflecting the income from the CBSA Work recorded in box 84 thereof: mixed goods and services. The T1204 recorded Mr. Marar's business account number, but not his social insurance number. Mr. Marar tracked his hours with the CBSA and testified such amounts were contained in invoices reflecting hours worked. Mr. Marar produced for the Court his "Client Fees Detail Report" for the entire 2014 year. It reflected remuneration of \$20.00/hour. Occasionally, the Report would reflect an "ADJ" entry which appears to be a credit back to the CBSA for overcharges or refunds of some kind. This credit calculation occurred five times during the year.

[4] Regarding Mr. Marar's translation Business not otherwise in dispute, a website for publicity and advertising purposes was maintained. It was designed by his daughter. His business organization, a sole proprietorship, is ATIS Connects. The service provided is interpretation and translation between Arabic and English. With the Business' other clients, CBSA is also listed as a client on the website.

[5] Mr. Marar described the CBSA Work as services generally consistent with those provided to his listed clients in the Business. The factual differences between the CBSA Work and the Business were, according to Mr. Marar's testimony, the high security nature of the CBSA services, the greater amount of hours of translation service provided, the team cohesion between him and CBSA employees and the low hourly remuneration. This latter difference meant that the CBSA services did not yield for him a "high rate of pay". There were no negotiations for the hourly rate; it was a published rate of pay and offered on a take it or leave it basis. However, he testified that the annual hours of the CBSA Work ranged between 1200-1300 hours, comprised of long days and rounded out his income when Business clients did not seek his services. The demands of the CBSA Work left him with little control over his hours, work or regularity. The hours were offered through one or more CBSA officials making a request for Mr. Marar to work a certain file, project or shift. If he had an engagement with a Business client, he would decline the CBSA Work.

[6] In terms of overtime hours, paid vacation, extended health/medical, dental and life insurance benefits, it was clear the CBSA did not provide them to Mr. Marar. Mr. Marar's CBSA Work equipment was minimal owing to the task: writing implements, paper and a provided office in which to conduct interviews. If Mr. Marar was not available for CBSA work, another translator/interpreter would be used or the specific task would be re-scheduled to a time when he was available.

[7] Mr. Marar was not cooperative with Respondent's counsel on providing information regarding a specific supervisor, primary contact or scheduler at the CBSA. This was true both in advance of and at the hearing. He did however confirm at the hearing that there were 6 to 10 supervisors per shift, anyone of whom would contact him to work. He could refuse CBSA Work. If he had to leave CBSA during hours of work, he would simply advise and leave. As he stated, "if I am not there, I am not there". Regarding his replacements when he was not there, he "had no idea what happened".

[8] Mr. Marar testified that he was the sole service provider for his Business. The website which described CBSA as a Business client was designed by his daughter. This classification was an error. In his testimony, both in chief and cross examination, and in submissions Mr. Marar said he "never claimed to be an employee" and was not before the Court to do so. However, the basis upon which he was engaged to undertake the CBSA Work constituted "a permanent, indefinite term contract of service" and therefore employment.

III. THE ISSUES AND THE LAW

[9] The essence of Mr. Marar's submission, based upon the evidence, is that, in respect of the CBSA:

- a) he is a permanent, indefinite duration worker under a contract of service;
- b) the work detracts from his commercial venture as it reduces the "real money" he otherwise makes from the Business;
- c) he is not and has never claimed to be an employee, but the directed, constrained and controlled nature of the work at CBSA cannot lead to a conclusion that the work is of a commercial or professional venture.

[10] As described for Mr. Marar at the conclusion of the evidence and submissions, this issue and question frequently comes before the Court: is a worker engaged in an indeterminate contract of service or a specific contract for service? In the first instance, the source of income is employment. In the latter, it is self-employment income, either business or professional such as that received from the clients of Mr. Marar's Business. While the facts are more or less emphasized or nuanced, as between the parties, the process for the determination of the central question remains constant: whether a person has been engaged to perform the

services is performing them as a person in business on his or her own account: (*Weibe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553, (“*Weibe Door*”)) as approved by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59.

[11] The process for such a determination has two steps. First the Court evaluates the subjective intention of the parties established or reflected in writing or by action at the outset. Second, the judge needs to analyze the factual situation concerning the conduct of the parties to determine whether it supports or disavows the subjective intention (*TBT Personnel Services Inc v. Canada*, 2011 FCA 256; *1392644 Ontario Inc. (Connor Homes) v. Canada (National Revenue)*, 2013 FCA 85)(“*Connor Homes*”). In comparing the objective reality to the subjective intention, the Court is required to look through the window of the *Weibe Door* factors: control, ownership of tools, ability to subcontract, opportunity to profit and risk of loss and integration within the payor’s business. After conducting that examination, the Court must determine on balance whether the person is in business on his or her own account. The factors are not an exhaustive list and no one factor predominates.

IV. ANALYSIS AND DECISION

[12] What is clear is the sequence for consideration. Firstly, the analysis begins with the subjective intention of the parties, if any. Using the prism of that intent, does the actual relationship of the parties, buttressed by reality, reveal employer/employee relationship or independent contractor?: *Connor Homes* at paragraph 42.

a) the intention of the Parties

i) Is there subjective mutual intent?

[13] In this particular appeal, subjective intention is an evidentiary problem for Mr. Marar. From his perspective alone, he admitted or submitted three times in total that he never proclaimed to be an employee of CBSA. The CBSA Work more or less transformed into a contract of service. This strikes the Court as a concession at the outset that the initial subjective intention of even the appellant runs contrary to the position taken on objection and appeal. Mutual intention however, requires the analysis of the work recipient, CBSA. There was no written employment agreement. There was distinct invoicing for payment. As well, the invoicing was carried out sporadically and subject to credits and adjustments between Mr. Marar and the CBSA. T1204s, and not T4s, were issued reflecting the remuneration.

There were no usual employee deductions withheld or benefits paid by CBSA: Income Tax, CPP or EI Withholdings or dental or extended health benefits. Apart from the absence of evidence before the Court of CBSA's initial intention, there is the dearth of evidence from Mr. Marar regarding the commencement of his CBSA tenure, the accounting or human resources staff he met with to commence his CBSA Work and/or any email, letter or memo outlining the basis upon which his services were procured. On balance if one chooses, the initial intention of the parties was that of the procurement of translation services from an established commercial translation service provider.

ii) Is further analysis necessary?

[14] Quite apart from the finding of the Court above, it is necessary to continue an analysis of the *Weibe Door* factors in order to confirm that the initial intention of the parties to procure a contract for translation services has not been transformed, as Mr. Marar asserts, into an indefinite contract of service between him and CBSA.

i) control

[15] Mr. Marar indicated that the rate of pay of \$20.00/hour was not negotiable and was not consistent with his view of remuneration he received from his Business. No evidence was provided of his Business rates or receipts. Even if that were true, Mr. Marar admitted he was free to decline at will and did decline at will CBSA Work if his Business existed and conflicted. This constitutes freedom to refuse CBSA Work. On its own this is a freedom inconsistent with employment. Mr Marar effectively chose when and for how long he would work at CBSA. If he needed to leave, he did. If he could not attend he would re-schedule and fulfill the CBSA Work later. Although he could not necessarily replace himself – he was the only translator in his Business – he did not address whether he may have been able to do so if he had more translators on his Business staff.

[16] With respect to hours of work, it was suggested these were consistent, scheduled and commensurate in quantity with full time employment. The evidence does not support this. Mr. Marar produced his entire CBSA Work hours for 2014. Curiously, these hours relating to “employment” were printed on a ATIS Connect “Client Fees Data Report”. The entries also appear, according to Mr. Marar, to have a reference number for invoicing and HST collectible. Aside from this, there is not one invoice that has the same number of hours in any given month. Further, the entries range from a much as 17 hours in an invoice period (again not on a consistent date each month or week) to as little as 3 hours. The entries also

included charge-backs to CBSA's credit. Lastly, Mr. Marar indicated the quantity of hours on account of CBSA Work was between 1300-1400 hours a year. The total hours worked on the Client Fees Data Report for 2014 was 893 hours. Such sporadic hours, adjustments to invoicing and charging of HST on remuneration are consistent with a contract for services.

[17] On supervision, there was never a suggestion anyone supervised the translation services. Firstly, no one at CBSA had the skills. If they did, Mr. Marar's services would not have been needed. Secondly, it was his service which allowed the CBSA investigators and clerks to continue their jobs and process their tasks. It was clear that at certain times he was present with CBSA guards during investigation and interrogation of Arabic speaking interviewees. How could it be otherwise? It was also clearly the same way with the RCMP, Superior Courts and Provincial Courts in his Business. In contrast, they were all customers of the Business. Whether in Business or in connection with the CBSA Work, Mr. Hara said it best, "I provided unbiased and professional translation as I saw fit". This is not an employee subject to uniform standards of timing, work product or quality assurance oversight.

ii) ownership of tools

[18] The ownership of tools is not particularly relevant to the work of translation. It was necessary for Mr. Marar to attend the CBSA venue and use its offices and presumably its secure computers, if needed. Comparatively, this was also true for his Business clients: RCMP and the courts. The lack of application of this factor likely reinforces the "professional services" nature of the work rather than whose business it was.

iii) chance of profit, risk of loss

[19] Mr. Marar testified that the CBSA Work derogated and detracted from the "real money" he could earn in his Business. As such, he preferred to deliver services to his Business clients if same were available. The fixed hourly rate was lower for the CBSA Work. He could never earn as much money undertaking the CBSA Work. It is this factor that provides a clear indication of why it was that the CBSA Work was part of the Business and not distinct from it. Mr. Marar seems to equate the lesser fees he could collect from CBSA with that of a "job" rather than consultation fees from that of a "profession". This comparison misses a large point. Mr. Marar had the opportunity to market his services within his translation service Business as a whole. He could accept CBSA Work and make "less profit" or, if other clients wanted him, decline the "busy work" of the CBSA and take the more

profitable work of other clients. This ability to manipulate revenue through choice and decision is a central economic input to the outcome of profit: revenue less costs. A contract of employment with its usual regular hours of work, mandatory attendance and fixed tasks would not afford sufficient opportunity to choose among work of differing value for different service recipients.

iv) integration of the services

[20] Mr. Marar had his own accounting services, web-site and business organization available and deployable for the provision of the translation services. The CBSA did not. That is the primary reason they required his services on the basis they did. He delivered those services on a stand-alone basis without any meaningful support or collateral or subsequent input of services from CBSA. From soup to nuts, the translation services were his and his alone and no-one else's.

V. CONCLUSION

[21] The only distinctions as between the CBSA Work and the Business, in Mr. Marar's view as well, are the facts that the CBSA Work earned him less, constituted more hours, was a bit monotonous and was largely carried out each engagement in the presence of the same CBSA staff at one or two identical locations. Beyond that, Mr. Marar provided the same services on the same basis to similar clients as between the Business and the CBSA Work. Based upon the analysis undertaken by the Court, both the initial mutual intention of the parties and the objective reality reveal that Mr. Marar was in business for his own account, whether working in his Business or doing the CBSA Work. As such, the appeal is dismissed without costs.

Signed at Ottawa, Canada, this 18th day of December 2018.

“R. S. Bocock”

Bocock J.

CITATION: 2018TCC259

COURT FILE NO.: 2017-3267(IT)I

STYLE OF CAUSE: NAZER NSM MARAR AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: Windsor, Ontario

DATE OF HEARING: November 19, 2018

REASONS FOR JUDGMENT BY: The Honourable Mr. Justice Randall S.
Bocock

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