Docket: 2010-309(IT)G

BETWEEN:

DAVID FREE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 18-19, 2013 and July 7, 2014,
at Toronto, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Alisa Apostle

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the Appellant's 2005 and 2006 taxation years is dismissed.

Costs in the matter are awarded to the Respondent.

Signed at Ottawa, Canada, this 7th day of November 2014.

"V.A. Miller"

V.A. Miller J.

Citation: 2014TCC329
Date: 20141107
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BETWEEN:

DAVID FREE,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] The Appellant failed to file his income tax returns for 2005 and 2006 and the Minister of National Revenue (the "Minister") assessed him pursuant to subsection 152(7) of the *Income Tax Act* (*"ITA"*) on the basis that he had received employment income of $60,416 and $92,700 in 2005 and 2006 respectively.

[2] In this appeal, the Appellant took the position that in 2005 and 2006 he was not an employee but was an independent contractor and the income he received in these years was business income. He claimed that he had a net business loss of $67,338 and $61,353 in 2005 and 2006 respectively.

[3] At the hearing, counsel for the Respondent stated that the only issue in this appeal was whether the Appellant was entitled to claim expenses against his employment income. However, the Reply to Notice of Appeal identifies the issues as follows:

a) whether the Minister properly determined that the Appellant was an employee of the Municipality of Meaford in 2005 and 2006; and,

b) whether the Appellant is entitled to claim expenses against the income he received from the Municipality of Meaford.

[4] I will address both issues which were raised by the pleadings.

Facts

[5] On March 21, 2005, the Appellant was engaged as Treasurer/CFO by the Corporation of the Municipality of Meaford (the "Municipality"). According to the by-law which was passed to effect this engagement, the Appellant was appointed to this position as an independent contractor and the Mayor of the Municipality was given the authority to sign a contract with the Appellant on that basis. His contract (the "Contract") was signed by him and the Mayor on March 21, 2005 and included the following:

a) The contract was for a period of one year and included the option to renew.

b) The compensation was $70,000 annually plus GST to be paid in equal twice monthly payments on the 15th and last working day of the month.

c) Receipted travel expenses associated with activities and business on behalf of the Municipality would be reimbursed.

d) Computer equipment and software would be supplied by the Municipality.

[6] The Appellant took the position at the hearing of this appeal that his Contract had been revised and a Management Consulting Agreement (the "Agreement") was entered into by the parties on March 22, 2005. The major terms of this Agreement were:

a) The Agreement was to last for a period not exceeding three years;

b) The Appellant's consulting services included the review, analysis and recommendation of organizational structures, procedures, accounting systems and processes. He was to prepare reports and present them with his recommendations to the management and Council of the Municipality and then manage the implementation of the recommendations which were approved by Council.

c) The Fees for services were $70,000 for 2005 and $100,000 for 2006 plus GST. The fees were to be billed in equal amounts on the 15th and 30th of each month.

d) The Appellant would be reimbursed for the following receipted expenses; (i) travel at the rate of $0.45/km; (ii) telephone; (iii) office supplies and other expenses; and (iv) sub-consultants.

[7] However, the invoices submitted by the Appellant to the Municipality do not support his position that the Contract was revised and that the Agreement governed the parties' relationship. Contrary to the Appellant's evidence, he invoiced the Municipality for the period October 2005 to August 30, 2006 on the basis that his compensation was $90,000 annually. Thereafter in 2006, he invoiced the Municipality on the basis that his compensation was $92,700 annually. In 2005 and 2006, he invoiced the Municipality for travel at the rate of $.40/km.

[8] The Appellant's Contract with the Municipality was revised by a Resolution of the Council in October 2005 so that he was appointed the Chief Administrative Officer ("CAO") as well as being the Treasurer of the Municipality. He stated that the terms of his contract remained the same as those agreed to in March 2005. A copy of this Resolution was not presented in Court but I note that, from October 2005 until December 2006, a Resolution was referenced on the Appellant's invoices to the Municipality. When the Appellant was appointed CAO, his compensation increased to the amounts noted in the previous paragraph.

[9] The Appellant stated that, in 2006, the Mayor raised the issue of the Appellant becoming a full time employee rather than being an independent contractor. I have inferred that these discussions were precipitated by the report given to Council by the Municipality's auditor, BDO Dunwoody. In his report to Council on June 7, 2006, Al White of BDO Dunwoody stated:

> "Employee/Sub-Contractor Relationship – Currently one of your senior staff members is paid as a sub-contractor. As a sub-contractor, there are no withholdings for income tax, Canada Pension Plan or Employment Insurance. It is a matter of fact whether this person is an employee or a sub-contractor. If the Canada Revenue Agency were to determine that the person was actually an employee and not a sub-contractor, the Municipality could be responsible for remitting CPP and EI on the payments to this person as well as interest and possible penalties. As the amount could be significant, we suggest that the Municipality obtain a ruling from the Canada Revenue Agency to determine their views of the employment status of this individual."

[10] The Canada Revenue Agency ("CRA") conducted an Employee Compliance Audit of the Municipality in January 2007 and determined that the Appellant was an employee of the Municipality in 2005 and 2006. CRA issued T4s on behalf of

the Municipality to the Appellant in the amount of $60,416.71 for 2005 and $92,700 for 2006.

[11] The Appellant did not appeal the Minister's determination. Instead, he commenced discussions with the Municipality concerning the terms of his employment contract. In either January or February 2007, the Appellant was advised that he should engage counsel to assist him with his negotiations with the Municipality.

[12] In a letter dated May 23, 2007 to the Mayor and the Director of Human Resources for the Municipality, the Appellant's counsel took the position that the Appellant was and had always been an employee of the Municipality. He wrote that he wished to finalize the Appellant's "Employment Agreement" and to resolve the outstanding issues with respect to the Appellant such as the liability for income taxes owing for 2005 and 2006, enrolment in OMERS (a pension plan), and compensation for overtime. According to this letter, when the Appellant became the CAO in October 2005, he was not presented with either a Consulting Contract or an Employment Contract but his compensation was increased to $92,700 annually. Counsel wrote that the Municipality continued to treat the Appellant as an independent contractor when the Appellant consistently took the position that he was an employee. According to counsel, the Appellant was clearly employed on a full time basis as Treasurer/CFO and Acting CAO.

[13] Shortly after the Municipality received the letter of May 23, it informed the Appellant that it had decided to end its relationship with him. In order to settle their disagreement, the Appellant and the Municipality submitted to mediation and completed Minutes of Settlement on August 3, 2007.

[14] David Hunks testified under subpoena on behalf of the Appellant. Mr. Hunks had been the Deputy Treasurer for the Municipality from August 2005 until December 2009. He was an employee of the Municipality. It was his evidence that the Appellant's name was not on the payroll. The Appellant was paid according to the invoices he submitted just like any other contractor. The Appellant did not work from 8:30 to 4:30 as Mr. Hunks did but was known to send emails at 3:00 in the morning with respect to various projects which Mr. Hunks worked on. Mr. Hunks then reported to the Appellant, Council and the Finance Committee concerning his progress on these projects. According to both the Appellant and Mr. Hunks, the Appellant did not have authority to sign cheques on behalf of the Municipality but Mr. Hunks was a signatory. Mr. Hunks supervised the assistants

in the Treasury Division of the Municipality. Mr. Hunks testified that the Appellant was a consultant to the Municipality.

[15] Although Mr. Hunks' evidence was inaccurate concerning whether the Appellant was reimbursed for cell phone usage, I found him to be a credible witness.

Employee or Independent Contractor

[16] To determine whether the Appellant was an employee or independent contractor while employed by the Municipality, it is necessary to determine if he was performing his services as a person in business on his own account: *671122 Ontario Ltd v Sagaz Industries Canada Inc*, [2001] 2 S.C.R. 983. The intention of the parties is important and I will use the factors from *Wiebe Door Services Ltd v MNR*, [1986] 3 FC 553(FCA) to analyze the work relationship between him and the Municipality with a view to ascertaining whether their working relationship was consistent with their intention.

[17] It is clear from Exhibit A-4, tab 1, page 1 that both the Appellant and the Municipality intended that the Appellant be engaged as an independent contractor in the position of Treasurer. Further, the Council Minutes for the meeting on October 17, 2005 (Exhibit A-2) showed that the parties intended the Appellant to be an independent contractor in his position as CAO.

[18] Although the *Municipal Act*, 2001, S.O. 2001, c. 25 subsection 286(3) does not require the Treasurer of a Municipality to be an employee, there is no such section with respect to the CAO of a municipality. Sections 227 and 229 of the *Municipal Act* provide:

> Municipal administration
>
> 227. It is the role of the officers and employees of the municipality,
>
> (a) to implement council's decisions and establish administrative practices and procedures to carry out council's decisions;
>
> (b) to undertake research and provide advice to council on the policies and programs of the municipality; and
>
> (c) to carry out other duties required under this or any Act and other duties assigned by the municipality.

> Chief administrative officer
>
> > 229. A municipality may appoint a chief administrative officer who shall be responsible for,
> >
> > > (a) exercising general control and management of the affairs of the municipality for the purpose of ensuring the efficient and effective operation of the municipality; and
> > >
> > > (b) performing such other duties as are assigned by the municipality.

[19] It was clear from Mr. Hunks evidence that he thought the Appellant was not an employee with the Municipality because he did not work a fixed number of hours and his name was not on the payroll. However, I have concluded that the Appellant was an employee when he performed his services for the Municipality. My conclusion is based on the Human Resources Policy for the Municipality (Exhibit R-2, Tab 13) (the "Policy") and the duties which the Appellant's former counsel said the Appellant performed (Exhibit R-2, Tab 17). These duties were in notes written by the Appellant when he was attempting to negotiate an employment contract with the Municipality.

The Policy

[20] According to the Policy, the CAO was not only an essential member of the Municipality's staff but he was in charge of the Municipality's managers. He was an integral part of the senior management of the Municipality. He reported only to the Council. The CAO, with others, ensured the equitable application of the Municipality's Policies. The CAO supervised the Department Heads employed by the Municipality (See section 2:03 of the Policy). He and the appropriate functional committee were responsible for preparing the performance evaluation for each of the Department Heads.

[21] The CAO and the Department Heads were responsible for recommending the hiring of all full time municipal staff. Temporary, part time and seasonal employees could only be hired, replaced or dismissed with the approval of the CAO. Full time employees could only be dismissed with the approval of the CAO and the Council. The CAO could only be dismissed with the approval of Council.

[22] The CAO was expected to attend up to two regular Council or committee meetings per month as part of his regular salary compensation. For time worked in

excess of 80 hours per calendar year, the CAO was entitled to be paid overtime at his straight time rate or granted straight time off in lieu.

[23] The CAO reported to the Council for the Municipality and it was responsible for ensuring an annual "employee Appraisal Report" was completed for the CAO (See paragraph 6.01 of the Policy). The Council clearly had the right to control the CAO: *Groupe Desmarais Pinsonneault & Avard Inc v Canada*, [2002] FCA 144 at paragraph 5.

[24] The CAO had the overall responsibility for managing the salary and wage administration program for the Municipality. He was also involved in approving the job descriptions for all positions with the Municipality. Job descriptions for all positions were prepared by the appropriate Department Head in consultation with the CAO. The CAO and Council approved the job descriptions.

[25] The CAO was responsible for scheduling the hours of work and approving the vacation schedules for the Department Heads.

[26] It is my view that the Municipality could not engage the Appellant as an independent contractor in the CAO position. The Policy makes it clear that the CAO had to be an employee of the Municipality.

The Appellant's Records

[27] The Appellant did not work from 8:30 to 4:30 as did Mr. Hunks. He also did not work a set number of hours per week when he was Treasurer or when he became CAO. As senior management he worked as many hours as were needed to get the job done. This is normal with most management positions. However, according to the Policy, the Appellant was entitled to overtime pay. According to the Appellant's records, he worked a total of 3,491 overtime hours between March 2005 and December 2006.

[28] His records indicate that while he was Treasurer, he performed numerous tasks including training staff in corporate records management; interviewing candidates for the position of Deputy Treasurer; performing the duties of Deputy Treasurer from July 2005 until September 2005 and performing the duties for various staff members while they were on vacation. Some of the Appellant's accomplishments when he was CAO were: he performed the duties of various positions when those positions were vacant or the occupant was on vacation; he developed the management team and handled many personnel problems; he was

involved in the recruitment and hiring of staff; he developed corporate performance reports; he delivered business plans; he reengineered corporate websites; and, he dealt with corporate health and safety concerns. He was instrumental in invoking changes from hourly pay to salaries for administrative staff and developing a municipal water bylaw.

[29] The Appellant was paid a fixed salary in 2005 and 2006. It is my view that this method of payment was more like that of an employee who is part of management than that of an independent contractor. He worked extra hours without pay.

[30] The Appellant stated that he used his own computer. However, according to his Contract, the Municipality provided him with a computer and an office. It was his choice to use his own computer and it does not negate the fact that one was made available to him by the Municipality.

[31] All of these facts from the Policy and the Appellant's records lead me to conclude that the Appellant was an employee while he performed the duties of Treasurer and CAO for the Municipality.

Expenses

[32] After the Appellant was assessed pursuant to subsection 152(7) of the Act, he filed income tax returns for 2005 and 2006. Even these returns do not support the position he took in this appeal. In those returns, he reported employment income of $60,416 and $92,700 in 2005 and 2006 and claimed nil business income but business losses of $67,338 and $61,353 in 2005 and 2006.

[33] There was evidence that the Municipality reimbursed the Appellant for his mileage and cell phone expense. Other than this evidence, there was no evidence that the Appellant incurred any other expenses. He submitted no receipts to the Court.

[34] The appeal is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 7th day of November 2014.

"V.A. Miller"

V.A. Miller J.

CITATION:	2014TCC329
COURT FILE NO.:	2010-309(IT)G
STYLE OF CAUSE:	DAVID FREE AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	July 18-19, 2013 and July 7, 2014
REASONS FOR JUDGMENT BY:	The Honourable Justice Valerie Miller
DATE OF JUDGMENT:	November 7, 2014

APPEARANCES:

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COUNSEL OF RECORD:

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Firm:

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