

Citation 2007TCC258
Court File No. 2006-1894(CPP)
2006-1893(CPP)

TAX COURT OF CANADA

IN RE: the Excise Tax Act

BETWEEN:

1483740 ONTARIO LTD. and FRANK JOSEPH BERTUCCI

Appellants

- and -

THE MINISTER OF NATIONAL REVENUE,

Respondent.

* * * * *

**HEARD BEFORE MR. JUSTICE WEISMAN
in the Courts Administration Service, Courtroom Number 6C,
180 Queen Street West,
Toronto, Ontario
on Friday, March 30, 2007 at 3:17 p.m.**

* * * * *

ORAL REASONS

APPEARANCES:

Mr. Frank Bertucci on behalf of the Appellants

Mr. Josh Hunter on behalf of the Respondent

A.S.A.P. Reporting Services Inc. 8 (2007)

**200 Elgin Street, Suite 1004
Ottawa, Ontario K2P 1L5
(613) 564-2727**

**130 King Street, Suite 1800
Toronto, Ontario M5X 1E3
(416) 861-8720**

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Reasons and Decision by Mr. Justice Weisman

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1 Toronto, Ontario

2 --- Upon commencing the oral reasons on Friday,
3 March 30, 2007 at 3:17 p.m.

4 THE COURT: I have heard two
5 appeals today, and I heard them together on common
6 evidence, by Frank Joseph Bertucci and a limited
7 company, 1483740 Ontario Limited, of which Mr.
8 Bertucci is the sole shareholder and director,
9 against a decision by the Respondent, the Minister
10 of National Revenue, which found that Mr. Bertucci
11 was an employee of the Appellant limited company,
12 under a contract of service from January 1, 2002 to
13 December 31, 2003, and accordingly both Appellants
14 were liable for Canada Pension Plan contributions.

15 In order to resolve this issue,
16 the total relationship between the parties must be
17 considered in order to resolve the central and
18 fundamental question as to whether the Appellant,
19 Mr. Bertucci, was performing his services for the
20 numbered company as a person of business on his own
21 account, or was performing them in his capacity as
22 an employee.

23 The evidence I have heard in the
24 matter must be subjected to the four-fold test laid
25 down in *Wiebe Door Services v. M.N.R.*, 87 DTC 5025,
26 as confirmed in *671122 Ontario Limited v. Sagaz*

1 The Appellant, Mr. Bertucci,
2 provided a vehicle, which was an important tool
3 given the spread-out nature of his route in Maple,
4 Ontario, requiring that he drive, as opposed to
5 walk, to make his deliveries.

6 He also provided a cell phone for
7 use on his delivery route. The vehicle and cell
8 phone, on a per-monthly basis, cost approximately
9 \$350.

10 Technically, therefore, the
11 limited company Appellant provided no tools which
12 would normally indicate that the Appellant,
13 Mr. Bertucci, provided the tools necessary to
14 accomplish his functions, which would indicate that
15 he was an independent contractor.

16 In my view, this is too narrow an
17 interpretation of the law. The test of an
18 independent contractor is whether he or she has the
19 tools necessary to fulfill his or her function.

20 Without getting too technical as
21 to the source of the tools, it is manifest that Mr.
22 Bertucci did not have the necessary tools.

23 In my view, the tools factor
24 accordingly points to his being an employee.

25 Chance of profit; the limited
26 company Appellant was paid \$2,600 per month to

1 deliver the mail and assorted packages, brochures,
2 and advertising materials.

3 The limited company, in turn, paid
4 Mr. Bertucci \$2,400 per month for this service.

5 The evidence is that Mr. Bertucci
6 was free to hire helpers, and under the particular
7 rules of the closely controlled Maple Post Office
8 with which he was associated, he was expected to
9 appear in person at least three months of the year.

10 This means that for nine months of
11 the year, he could profit by engaging others as
12 independent contractors at less than the \$2,400 per
13 month he was assured from the limited company
14 Appellant, and retain the difference.

15 All of this arises out of the fact
16 that he was not required to do the work personally.

17 During the period under review, he
18 could also personally bid on routes in other
19 municipalities, such as Richmond Hill and
20 Woodbridge, where he was free to retain others to
21 do the work at less than he was being paid by
22 Canada Post, and retain the difference as profit.

23 Thirdly when he could find the
24 time, Mr. Bertucci offered to assist other mail
25 deliverers, who were either ill or on vacation,
26 thereby augmenting his profit.

1 Counsel for the Minister argued
2 that during the period under review, Mr. Bertucci
3 in fact did not hire others to do his route, and
4 did not go to Canada Post and obtain other routes.

5 But the law is not whether he
6 actually profited, but whether he had a chance to
7 make a profit. And that factor accordingly
8 indicates that he was an independent contractor.

9 Risk of loss; when Mr. Bertucci
10 was ill or on vacation, he had to engage helpers to
11 do his route, because the mail had to be delivered,
12 and he paid them from \$100 to \$110 per day.

13 Mr. Bertucci candidly volunteered
14 the evidence that if he was engaging someone for as
15 much as a month at a time, he could negotiate a
16 lower wage.

17 Given an average of twenty-three
18 mail delivery days per month, this cost, even at a
19 \$100 per day, would be \$2,300 per month, plus Mr.
20 Bertucci's \$350 per month fixed vehicle and cell
21 phone expenses, would exceed the \$2,400 being paid
22 him by the limited company Appellant, and
23 accordingly he would face a risk of loss of \$250
24 per month.

25 This factor accordingly also
26 indicates that he was an independent contractor.

1 The examination of these four
2 factors are only in service of understanding the
3 legal nature of the relationship between the
4 parties.

5 In this regard, Mr. Bertucci never
6 charged the limited company GST for his services,
7 which indicates that he was an employee.

8 Next, we have a statement from the
9 court of the Queen's Bench in England, in the case
10 of Ready Mixed Concrete v. Minister of Pensions,
11 [1968] 1 All E.R. 433 (Q.B.D.):

12 "Freedom to do a job either
13 by one's own hand or by
14 another's is inconsistent
15 with a contract of service."

16 Mr. Bertucci had that freedom,
17 which accordingly would indicate that he was an
18 independent contractor.

19 Thirdly, Mr. Bertucci candidly
20 stated, "I am entrepreneurial." This resonates
21 with the following statement from *Wolf v. Canada*,
22 [2002] F.C.J. No. 375 in the Federal Court of
23 Appeal at paragraph 118:

24 "We are dealing here with a
25 type of worker who chooses to
26 offer his services as an

1 independent contractor rather
2 than as an employee and with
3 a type of enterprise that
4 chooses to hire independent
5 contractors rather than
6 employees. The worker
7 deliberately sacrifices
8 security for freedom.."

9 Further down, in Paragraph 120,
10 the court says:

11 "If specific factors have to
12 be identified, I would name
13 lack of job security,
14 disregard for employee-type
15 benefits, freedom of choice
16 and mobility concerns."

17 referring to the type of worker
18 that chooses to be an independent contractor rather
19 than an employee.

20 Finally, in considering the
21 relationship between the parties, I come to the
22 intentions of the parties.

23 Referring to *The Royal Winnipeg*
24 *Ballet v. Canada*, [2006] F.C.J. 339, Mr. Justice
25 Noel stated:

26 "...In my view, this is a case

1 where the characterization
2 which the parties have placed
3 on their relationship ought
4 to be given great weight...
5 But in a close case such as
6 the present one, where the
7 relevant factors point in
8 both directions with equal
9 force, the parties'
10 contractual intent, and in
11 particular their mutual
12 understanding of the
13 relationship, cannot be
14 disregarded."

15 It is eminently clear that Mr.
16 Bertucci, and therefore his limited company,
17 intended the he be an independent contractor, and
18 where the four-fold test produces equivocal
19 results, as in this matter before me -- because
20 control and tools point to the employee result,
21 whereas the chance of profit and risk of loss point
22 to the independent contractor result -- the
23 intention of the parties should be given great
24 weight, and that points to Mr. Bertucci being an
25 independent contractor.

26 I would like to comment on the

1 chance of profit and risk of loss factors.

2 One would have thought that if
3 one's vocation involved both a chance of profit and
4 a risk of loss, which are the very essence of a
5 commercial enterprise, that would be a strong
6 indication that the worker was an independent
7 contractor carrying on business in his or her own
8 right.

9 Faced with the converse situation,
10 however, where the worker in question had no chance
11 of profit and no risk of loss, the Federal Court of
12 Appeal in *City Water International Inc. versus*
13 *Canada*, [2006] F.C.J. No. 1653, found workers to be
14 independent contractors, based on the indeterminacy
15 of the four-fold *Wiebe* guidelines and the common
16 intention of the parties.

17 The burden was upon the Appellant
18 to demolish the assumptions set out in the
19 Minister's reply to the Notice of Appeal.

20 In the Minister's reply with
21 respect to Mr. Bertucci, if one peruses the main
22 assumption in Paragraph 12 of the Minister's reply,
23 it is apparent that the assumptions do not address
24 the essential elements of the four-fold test of
25 control, chance of profit or risk of loss, but only
26 address the tool guidelines in a perfunctory

1 manner.

2 Accordingly, they do not support
3 the Minister's decision, which is objectively
4 unreasonable. I find that Mr. Bertucci was
5 carrying on business in his own right as a mailman.

6 As a result, these two appeals
7 will be allowed, and the two decisions of the
8 Minister will be vacated.

9 I appreciate your assistance, and
10 I wish you a good day.

11 --- Whereupon the hearing adjourned at 3:34 p.m.

I HEREBY CERTIFY THAT I have, to the best of my skill and ability, accurately recorded by Stenomask and transcribed therefrom, the foregoing proceeding.

Nancy Greggs, CCR

ASAP Reporting Services Inc.
(613) 564-2727

(416) 861-8720

CITATION: 2007TCC258

COURT FILES NO.: 2006-1894(CPP) and
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STYLE OF CAUSE: 1483740 Ontario Ltd. and
Frank Joseph Bertucci and
The Minister of National Revenue

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 30, 2007

ORAL REASONS FOR
JUDGMENT BY: The Honourable N. Weisman,
Deputy Judge

DATE OF ORAL JUDGMENT: March 30, 2007

APPEARANCES:

Agent for the Appellant: Frank Joseph Bertucci

Counsel for the Respondent: Josh Hunter

COUNSEL OF RECORD:

Counsel for the Appellant:

Name:

Firm:

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of
Canada Ottawa, Canada