Citation: 2012 TCC 15
Date: 2012**0313**
Docket: 2009-2782(CPP)

BETWEEN:

ANMAR MANAGEMENT INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

TONY PARROTTINO,

Intervener.

AMENDED REASONS FOR JUDGMENT

(Edited from the transcript of Reasons for Judgment delivered orally from the Bench on February 25, 2010 at Calgary, Alberta)

Campbell J.

[1] Let the record show that I'm delivering oral reasons in the matter of AnMar Management Inc., which I heard on Tuesday. This is an appeal under the *Canada Pension Plan*. I'm going to reference it as "CPP" throughout my reasons.

[2] In respect to the Appellant's 2006 and 2007 taxation years, the Minister determined that Tony Parrottino, referred to as the "worker" throughout, was employed by the Appellant under a contract of service, and consequently assessed the Appellant for CPP contributions in respect of the worker for both of these taxation years.

[3] The Appellant is in the business of management consulting. The worker stated that the Appellant corporation signed all of the business contracts with the third parties and that those clients belonged to the Appellant. The worker was the sole shareholder, director and also president of the Appellant. The

Appellant's business premises are located in the worker's residence, although the majority of the services are performed at the client's premises.

[4] The worker testified that he incorporated because many of his clients will deal only with a corporation. The worker has performed services solely for the Appellant since its incorporation.

[5] The worker's earnings were based on the year-end net profits of the Appellant. Based on accounting advice, the worker testified that he took net profits as a shareholder to lessen his tax burden. He did not invoice the Appellant but took draws as needed throughout the year. He worked whatever hours were required to complete the Appellant's contracts based on the clients' needs. The worker's tasks included delivery of services, acquiring contracts, administration, marketing and bookkeeping. Although he did not keep a record of his hours worked, a ledger was maintained that recorded hours worked and the rate to be charged in respect to clients' invoices. Otherwise, he stated, there was no value in recording this information.

[6] The worker never replaced himself as he stated there would be no one else that could do his job. He was the "face" of the Appellant's business and stated that AnMar would not exist without him and his expertise.

[7] The worker supplied the necessary tools and equipment to complete the services, including the office space and equipment plus a vehicle. The Appellant paid all of the operating expenses, including the proportionate amount for office and vehicle expenses and reimbursed the worker when he incurred business expenses personally.

[8] The Minister believes that the worker was not in business for himself when performing services for the Appellant. The Appellant's position is that the worker is not an employee of the corporation, but an independent contractor and, therefore, not responsible to pay CPP contributions.

[9] In 2005, being the Appellant's first year of business, the Canada Revenue Agency (the "CRA") completed an audit and required that the worker receive a T-4 and submit CPP contributions. The Appellant provided a T-4 in 2005 based on the CRA's recommendation but did not do so in 2006 and 2007. However, according to the worker and Ms. Duncan, the accountant, the Appellant paid its CPP and taxes on time for 2006 and 2007.

[10] In addition to the assessment for CPP contributions, penalties were also levied pursuant to paragraph **<u>21(7)</u>** of the *Canada Pension Plan* (which charges ten percent of the amount that a tax payer is liable to remit) as well as penalties pursuant to subsection 162(7) of the *Income Tax Act*. The Appellant submits that these penalties, which amount to approximately $5,800, are excessive.

[11] The issue in this Appeal is whether the worker was employed with the Appellant under a contract of service or, in other words, as an employee or under a contract for services as an independent contractor. A decision on this issue will determine whether the employment was insurable and, consequently, whether CPP contributions as assessed by the Minister are owing.

[12] The tests or factors to be referenced in deciding whether an individual is an employee or not were set forth in *Wiebe Door Services Ltd. v M.N.R.* (1986), 87 D.T.C. 5025 (F.C.A.). The Supreme Court of Canada in *671122 Ontario Ltd. v Sagaz Industries Canada Inc*., 2001 SCC 59, [2001] S.C.J. No. 61, at paragraphs 46 and 47, discussed the *Wiebe Door* factors and stated that the central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account.

[13] The Respondent referred me to several cases, which held that a sole shareholder/director of a corporation was an employee and not an independent contractor. In *Meredith v The Queen*, 2002 FCA 258, the Federal Court of Appeal reviewed the *Wiebe Door* factors and discussed the corporate concept of “piercing the corporate veil”. The Court stated that a court cannot pierce the corporate veil to “recharacterize the *bona fide* relationships on the basis of what it deems to be the economic realities underlying those relationships.”

[14] The Respondent also referred me to several cases, including *Desmarais v Minister of National Revenue*, 2006 TCC 329, *MacMillan Properties Inc. v Minister of National Revenue*, 2005 TCC 654, and *Pro-Style Stucco & Plastering Ltd. v The Queen (M.N.R.)*, 2004 TCC 32. In all of these cases, the Court held that the sole shareholder/director was an employee of the corporation. However, Respondent Counsel did not refer me to any other cases, which supported the opposite view that a sole shareholder/director of a corporation may also be an independent contractor. I would have expected counsel to do so if, in fact, such case law existed and it surely does.

[15] Justice Miller in *Kewcorp Financial Inc. v The Queen*, 2008 TCC 598, Associate Chief Justice Bowman (as he was then) in *Zupet v The Queen (M.N.R.)*, 2005 TCC 89, and Justice Sheridan in *765750 Alberta Ltd. v. The Queen (M.N.R.)*, 2007 TCC 149, to name a few, all concluded that the taxpayers there were independent contractors even though they were sole shareholders/directors.

[16] There was no written agreement or contract between the Appellant and the worker respecting their relationship but one thing is clear. The worker intended his relationship with AnMar to be that of an independent contractor. I believe his evidence established that he was sufficiently sophisticated generally in business to appreciate the difference between an employee and an independent contractor status.

[17] Intention, as a factor, was not mentioned by the Respondent, but in addition to the *Wiebe Door* factors, it has gained importance in jurisprudence in the last number of years.

[18] The whole concept of the shareholder/director of a corporation, which he or she owns and controls, also being an employee is a difficult, although not impossible, reality that may exist. The question is: Who is controlling things in those circumstances?

[19] Justice Bowman in the case of *Zupet*, which I referenced above, put it succinctly at paragraphs 11 and 12 where he stated, and I quote from that case:

> [11] I should think that even lawyers who are accustomed to juggling in their heads a variety of inconsistent legal fictions that bear no resemblance to reality might have some philosophical difficulty with the idea that an artificial person of which the only mind is the mind of an individual that owns it exercises a degree of control over that individual sufficient to establish a master-servant relationship.
>
> [12] Yet that is exactly what the Courts have done.

[20] Justice Bowman again, at paragraph 13 of *Zupet,* went on to point out the inherent difficulties with this concept, and I quote:

> [13] … This is an accepted fact of commercial reality (or, if you will, commercial unreality). One can sell to one's company, buy from one's company, and lease to or from one's company. And one can be an employee

> of one's own company. I understand it to be generally accepted that a meeting of the minds is an essential ingredient in a contract. One might wonder how there can be a meeting of the minds when we have only one mind - in essence, an identity or fusion of minds. This seems, however, to bother no one."

[21] So in the final analysis, what do we have in this appeal? The starting place is the existence, or not, of a written or oral agreement between the parties. There is no written agreement in this appeal although that, on its own, may not be determinative of the relationship. From here, there are a number of questions which must be addressed. Again, Justice Bowman in *Zupet*, at paragraph 17, stated that the other questions to be answered are: Whether the stated legal relationships are genuine and binding and not a sham. Secondly, what in fact did the parties do? With what type of relationship is their behaviour more consistent? Thirdly and finally, what type of relationships did the parties intend? All of these questions merge and overlap and must, in the majority of cases, be considered and answered together against the backdrop of all of the facts of the case. In most cases, it is important to step back and look at the "big picture".

[22] Since there is no suggestion of sham here, the issue involved the nature of the contract, although not written, between the parties, the Appellant, AnMar Management and the worker.

[23] I conclude that the contract was a contract for services or that of an independent contractor to the corporation. The worker supplied all the tools, the office space, the office equipment and the vehicle. The worker also had a chance of profit and risk of loss. The worker's income was directly dependent upon profit or loss, as the case may be, of the corporation. In fact, the worker generated the profit/loss of the corporation by obtaining and completing third-party contracts. I do not believe the remuneration is ascertainable here. Yes, the formula was that the worker received the net profits of the corporation, but the worker was free to contract on his own in the absence of a written contract and the corporation would, in that year, potentially have no profit or loss.

[24] In respect to control, the **<u>worker</u>** determined his own hours of work. The only reason he maintained a ledger of hours and rates was for invoicing clients but, otherwise, he stated that there was no value in these recordings. He established his own schedule based on clients' needs. He did not receive wages and instead received draws. Although he did not work for others besides the

corporation, there was nothing in the facts to indicate that he could not have done so if he chose.

[25] The application of the *Wiebe Door* test points more in the direction of a contract for services, although, admittedly, there is overlapping here. It is not a clear-cut case. The importance of intent in this case cannot be overstated and I refer here to the cases of *Poulin v The Queen*, 2010 TCC 313, and *Wolf v The Queen*, [2000] T.C.J. No. 696. Clearly, according to the worker's evidence, he intended to be an independent contractor from the outset, both from his personal perspective and also from the perspective of his position as controlling mind of AnMar Management. His testimony is corroborated by Ms. Duncan and by the conduct of the parties.

[26] The Respondent also argued that according to the definitions of "employee", "employment" and "office", contained in subsection 2(1) of the *Plan*, the worker is within those definitions because he is an officer of AnMar and the term "employee" includes an "officer". Since I have determined that the worker is not an employee, these definitions do not apply. He is an officer but I have determined he is not an employee and because he is not performing services under an express or implied contract of service, he is not within the definition of "employment". The definition of "office" references all of those positions entitling individuals to a "fixed or ascertainable remuneration" but I have determined otherwise based on the facts of this appeal. The definition ends by stating, "…and "officer" means a person holding such an office" or, in other words, such an office that entitles him to fixed or ascertainable remuneration.

[27] For these reasons, the appeal is allowed and the decision of the Minister that the worker was employed in pensionable employment is vacated.

Signed at Ottawa, Ontario, this **13**th day of **March** 2012.

"Diane Campbell"

Campbell J.

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