

Citation: 2013TCC193

Date: 20130619

Docket: 2012-3991(EI)

BETWEEN:

JESUS GUEVERA,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

**REASONS FOR JUDGMENT**

(Delivered orally from the bench on April 12, 2013,  
in Vancouver, British Columbia.)

V.A. Miller J.

[1] The Appellant appeals from a determination made by the Minister of National Revenue (the “Minister”) that he was not employed in insurable employment with Tricon Pacific Contracting Ltd. (the “Payor”) during the period July 1, 2010 to October 10, 2010.

[2] The witnesses at the hearing were the Appellant and Alex Chang.

[3] The Payor was in the business of building new homes and making renovations to existing homes. It was incorporated in 2008 and started to operate in 2009. Alex Chang was its only shareholder.

[4] Prior to 2009, Mr. Chang had operated FCH Construction Ltd. and its business was rolled into the Payor’s in 2009.

[5] The Appellant had a painting business which he operated as a sole proprietor under the name Prism Coating and Design.

[6] According to the evidence, the Appellant had worked with Mr. Chang’s various companies since 1996. Mr. Chang testified that the Appellant worked both as a manager with Tricon and as an independent contractor with Tricon. His

employment status depended on Tricon's cash flow. If Tricon had sufficient cash flow, the Appellant was employed by Tricon as a manager of its many projects. On occasion when Tricon did not have enough cash, Tricon gave the Appellant one of its own customers so that the Appellant could complete the contract and get paid by the customer.

[7] During the period, the Appellant's duties with the Payor were to manage the Payor's work sites to ensure that the work was properly completed by the Payor's crew. In addition, the Appellant ordered and picked up the materials required for the various jobs. He was covered for WCB which was paid by the Payor.

[8] I inferred from Mr. Chang's evidence that he thought that the Appellant was an employee during the period. Mr. Chang thought that he could not give the Appellant an ROE for this period because the Payor was audited by the Canada Revenue Agency ("CRA"). The relationship between the giving of an ROE and the CRA audit was never explained to the Court.

[9] To determine whether an individual is working as an employee or an independent contractor, the ultimate question is whether or not the individual is performing the services as a person in business on his own account: *1671122 Ontario Ltd v. Sagaz Industries Canada Inc.*, 2011 SCC 59. In the recent decision *1392644 Ontario Inc. O/A Connor Homes v. Minister of National Revenue*, 2013 FCA 85, Mainville JA, speaking for the court, set out a two step inquiry to address this central question. He stated:

The first step of the analysis should always be to determine at the outset the intent of the parties and then, using the prism of that intent, determining in a second step whether the parties' relationship, as reflected in objective reality, is one of employer-employee or of independent contractor.

In this second step, the factors discussed in *Sagaz* and *Wiebe Door* are relevant without any particular factor being dominant.

### **Intention of the Parties**

[10] It was the Appellant's evidence that he was an independent contractor with the Payor for January 1 to June 30, 2010. He then asked to be placed on the payroll as an employee with the Payor from July 1, 2010 to October 31, 2010. It was Mr. Chang's evidence that the Appellant was both an employee and independent contractor with

the Payor during the period July 1 to October 31, 2010. However, this conflicted with his later evidence when he testified about giving the Appellant an ROE.

[11] The Appellant did not file his 2010 income tax return in accordance with his stated intention. In his 2010 return he reported business income and claimed business expenses but he did not report any T4 income. He explained that he did not report employment income because he was not able to get a T4 from the Payor until December 2011. He has since amended his income tax return for 2010.

[12] It is my view that the Appellant and the Payor decided whether the Appellant was an employee or an independent contractor without regard to the actual relationship between the parties. Their decision was based on how the Appellant wanted to be paid for the period.

### **Control**

[13] Mr. Chang testified that he did not supervise the Appellant in how he performed his work. He stated that he had worked with the Appellant for at least 10 years and the Appellant was very experienced in the business.

[14] The Appellant disagreed with Mr. Chang's evidence. He stated that he was held accountable and was supervised by Mr. Chang who contacted him several times each day by cell phone. Mr. Chang often directed him to go to different job sites.

[15] It is my view that it is normal when one is engaged for his expertise that he is normally not closely supervised in the performance of his services. However, the question is not whether the Payor exercised control over the Appellant, but whether the Payor had the right to exercise such control: *Groupe Desmarais Pinsonneault & Avaré Inc. v Canada*, [2002] FCA 144 at paragraph 5.

[16] The Appellant's evidence was not shaken on cross examination and I have concluded from his evidence that the Payor did supervise him and that it had the right to control the way he performed his services. It is my view that the control factor indicates that there was a contract of service between the Appellant and the Payor.

### **Ownership of Tools**

[17] As is customary in the construction business, the Appellant owned all hand tools which he needed to perform his services. However, if larger tools were required, he used the Payor's tools.

[18] It was the Appellant's evidence that he and the Payor traded vehicles with each other during the period. The Appellant had a GM truck which was suitable for delivering equipment and supplies to the job sites and the Payor had a Jeep Cherokee. They switched vehicles so that another employee could use the GM truck to deliver supplies to the job sites. The Payor paid for the gas and maintenance of the Jeep Cherokee which was used by the Appellant.

[19] It is my view that the ownership of tools factor is more indicative of an employee/employer relationship.

### **Subcontractors and Hiring Helpers**

[20] The Appellant stated that during the period he did not have any contracts of his own and he could not have any contracts of his own because he worked almost 60 hours a week for the Payor. The Appellant stated that he often worked from 8AM until 6PM six days a week. Neither he nor the Payor kept track of his hours.

[21] During the period, the Appellant did not hire helpers to assist him in his duties with the Payor.

### **Chance of Profit/Risk of Loss**

[22] The Appellant and the Payor negotiated the Appellant's salary for the period.

[23] His salary was \$4,000 monthly less deductions. However, he was only paid for the months of July and August 2010. The Payor did not have the funds to pay him for September and October 2010; and in November, the Payor offered to give the Appellant one of its clients.

[24] It is my view that, during the period, the Appellant did not have a chance of profit. He did suffer a loss because the Payor was unable to pay him for the last two months that he worked. However, he did not have a loss in the entrepreneurial sense.

### **Conclusion**

[25] When I consider all of the factors, I conclude that the Appellant was not in business on his own account during the period. The terms of his relationship with the

Payor, when analyzed against the *Wiebe Door* factors, support his intention to be an employee during the period.

[26] The appeal is allowed.

Signed at Ottawa, Canada, this 19<sup>th</sup> day of June 2013.

“V.A. Miller”

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V.A. Miller J.

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COURT FILE NO.: 2012-3991(EI)  
STYLE OF CAUSE: JESUS GUEVERA AND  
M.N.R.  
PLACE OF HEARING: Vancouver, British Columbia  
DATE OF HEARING: April 12, 2013  
REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller  
DATE OF JUDGMENT: April 19, 2013  
DATE OF REASONS  
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APPEARANCES:

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