

# Tax Court of Canada Judgments

## W. B. Pletch Company Limited v. The Queen

Court (s) Database: Tax Court of Canada Judgments

Date: 2005-12-10

Neutral citation: 2005 TCC 400

File numbers: 2002-3536(IT)G

Judges and Taxing Officers: Joe E. Hershfield

Subjects: Income Tax Act

Docket: 2002-3536(IT)G

BETWEEN:

W.B. PLETCH COMPANY LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on June 3, 2005 at London, Ontario

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Appellant: David J. Thompson

Counsel for the Respondent: Peter M. Kremer, Q.C.

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JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 1998 and 1999 taxation years are dismissed, with costs, for the reasons set out in the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 10th day of December 2005.

"J.E. Hershfield"

Hershfield J.

Citation: 2005TCC400

Date: 20051210

Docket: 2002-3536(IT)G

BETWEEN:

W.B. PLETCH COMPANY LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hershfield J.

[1] These are appeals with respect to the Appellant's 1998 and 1999 taxation years. In each year the Appellant corporation earned and reported income made in respect of services performed for a company known as Thyssen Elevator Limited ("Thyssen"). The Respondent assessed the Appellant's income on the basis that it was income from a personal services business as that term is defined in subsection 125(7) of the *Income Tax Act* ("the *Act*"). The definition reads as follows:

"personal services business" carried on by a corporation in a taxation year means a business providing services where

- (a) an individual who performs services on behalf of the corporation (in this definition and paragraph 18(1) (p) referred to as an 'incorporated employee'), or
- (b) any person related to the incorporated employee

is a specified shareholder of the corporation and the incorporated employee would reasonably be regarded as an officer or employee of the person or partnership to whom or to which the services were provided but for the existence of the corporation, unless

- (c) the corporation employs in the business throughout the year more than five full-time employees, or
- (d) the amount paid or payable to the corporation in the year for the services is received or receivable by it from a corporation with which it was associated in the year.

[2] The only issue in these appeals relate to one aspect of this definition. That is whether Mr. Gary Pletch, who was engaged by the Appellant to provide the contracted for services to Thyssen, would reasonably be regarded as an officer or employee of Thyssen but for the existence of the corporate Appellant. If so the Appellant's income from Thyssen would not qualify as active business income and would not be entitled to a lower rate of tax as provided for in section 125 of the *Act*.

[3] Although most assumptions set out in the Reply to the Notice of Appeal were uncontested and a statement of agreed facts (Agreed Statement of Facts) was submitted, Mr. Pletch appeared as a witness to supplement the evidence. I have appended the Agreed Statement of Facts to these Reasons. The following summary includes evidence given by Mr. Pletch:

- (a) The Appellant was owned by Mr. Pletch and his wife;
- (b) The Appellant was incorporated in July 1980 to carry on farming operations previously carried on personally;
- (c) In addition to carrying on farming operations Mr. Pletch had worked in the lift/elevator business since 1968. He worked his way up from welder to mechanic to supervisor to foreman of major projects. Such engagement was as an employee of a company I will refer to as "Armor Elevator". That engagement was in place at least until the last couple of months of its term which ended in September 1980. Mr. Pletch testified that on the formation of the Appellant in July 1980, he insisted that his engagement with Armor Elevator be changed from that of employee to that of independent contractor with his services being available through the newly formed Appellant corporation;
- (d) Mr. Pletch moved to a newly formed company ("Northern") in September 1980. Northern was formed to service and modernize elevators. Mr. Pletch had a 10% interest in the company and was engaged, according to his testimony, as an independent contractor. There was no formal written agreement. There is no evidence that the engagement was with the Appellant corporation.
- (e) Northern was acquired by a German company ("Thyssen M.A.N.") in 1986. As part of the acquisition of Northern by Thyssen M.A.N. in 1986, a management agreement was entered into between Northern, the

Appellant, Mr. Pletch and Thyssen M.A.N. whereby the full-time services of Mr. Pletch were committed by the Appellant to provide management services to Northern. Northern was later renamed "Thyssen";

(f) The agreement was for a term of five years and has been renewed yearly since the expiration of its first term. An amending note to this agreement was signed in May 1997 (the "Amending Note");

(g) Mr. Pletch was president and a director of Thyssen until the summer of 1999. That Mr. Pletch was to be president of Thyssen is set out in the management agreement and in the Amending Note. In the summer of 1999 Mr. Pletch was replaced as president but he continued as vice-president and a director of Thyssen throughout the relevant period. His responsibilities after being replaced as president were substantially unchanged.<sup>[1]</sup> Mr. Pletch was never paid compensation as an officer of Thyssen;

(h) Mr. Pletch was also on the board of directors of seven of 13 Thyssen related companies (the "Thyssen Group") all under the indirect control of Thyssen M.A.N.<sup>[2]</sup> Under the umbrella of the management agreement with Thyssen, Mr. Pletch provided services to, and had and exercised the authority to direct the operations of, all the companies in the Thyssen Group. He was subject to the broad direction and instruction of Thyssen M.A.N. in the conduct of his duties and as president of Thyssen, he was subject to the direction of the board of directors of Thyssen which met twice a year and included two members from Germany;

(i) Although subject to such direction and in spite of the fact that the agreement required the Appellant to cause Mr. Pletch to devote his full working time and attention to the business and affairs of Thyssen and take only four weeks vacation, Mr. Pletch exercised independence in the performance of his responsibilities under the agreement. He came and went largely as his schedule dictated including taking six to eight weeks vacation and days off without seeking or needing to seek approval. Indeed, based on Mr. Pletch's testimony, it is fair to say that the degree of independence exercised by Mr. Pletch in terms of his work schedule is not typical of most senior executive officers.

(j) As to the work performed, Mr. Pletch's testimony was forthright and credible. After acknowledging that, under the contract, he was under the direction of Thyssen's board of directors, he testified as to what was expected of him as follows:

Q. And how would you know from time to time what was expected of you?

A. It was a pretty - pretty open book. I mean, our basic agreement was I met the board of directors about twice a year. The board of directors included a couple of people from Germany also at this time.

My job was to look after all of this Northern Elevator business in Canada at this time. I believe I was also involved in the Mexican operation, the Mexicala plant operation. And the various branches, a couple in New York City.

I would look each month at their financial statements and take - if there was 13 or 14 of them - take the bottom two or three, the ones doing the poorest as far as financially, and go and visit with them.

My job was to take a look at the customers they're dealing with. To take a look at the management style. To take a look at what I thought the problems were. To assess the managers they had in place and supervision, and to come up with a plan, with the people locally, of how to fix their problems. Identify their problems and fix what I thought they should do better.

And I would then draw up a schedule. It was only between me and them - it never went back to the board of directors - to show what milestones should be in place and here's where we should be in 30 days, 60 days.

In some cases you may find a manager who wasn't so good at reading financial statements or wasn't so good at customer relations. I would ask them to maybe take some night courses or to get some help or take them under my wing.

And from that point I would leave them about 90 days and have the milestones and see how they did. If they did fine, and 80 per cent of them did, then I'd carry on to the next.

The 20 per cent, probably over the years 20 per cent did not do so good. Just they were probably the wrong manager in place initially that someone else had picked. Then I would look for a replacement and train the new manager to run that operation.

And I just kind of went where I wanted to and came when I wanted to. If I needed some time off to do some farming I would do that or work my schedule around it.

(k) In cross examination Mr. Pletch acknowledged that as president of Thyssen he had responsibility for the operations of and authority over the 13 companies comprising the Thyssen Group, and could give directions to managers. Indeed he acknowledged that he could terminate the services of managers. He understood that he was an executive with responsibilities to Thyssen to direct and supervise its affairs;

(l) Initially, after the acquisition by Thyssen M.A.N., there was a second executive of Northern, a Mr. Elliot, who was responsible for the finance and manufacturing side of Thyssen M.A.N.'s Canadian operations. Elliot eventually went to Germany to take on a larger role. When that happened, Mr. Pletch took over much of Elliot's role but his testimony was to the effect that his experience was in the field side of operations, not manufacturing, which was an area eventually taken over by the new president who replaced Mr. Pletch in late 1999;

(m) The independence afforded Mr. Pletch stems from his ability to perform his responsibilities to the apparent satisfaction of Thyssen and Thyssen M.A.N. without their imposing a strict working schedule and from his obvious skills in acquitting his role without direction. His work ethic and personal energy allow him to commit some 50 hours a week to the engagement with Thyssen while still having time to run one of the largest ranches in the country;

(n) The ranch is owned by the Appellant and in the years in issue had one of the largest herds in the country. Its operations included a feed lot as well as crop farming. Mr. Pletch, on behalf of the Appellant, essentially worked on a full-time basis heading up these operations. That is, Mr. Pletch had two full-time occupations which were made easier by the seasonal nature of the ranch operations and the flexibility afforded by Thyssen. He travelled on Thyssen business on behalf of the Appellant throughout the year except during planting and harvesting when he was required to be at the ranch. But even while away attending to Thyssen business, other ranch matters were being attended to by him by phone and other means of communication on virtually a daily basis. Taking all of this into consideration, I find that Mr. Pletch was a full-time, hands-on, worker in respect of both the Appellant's ranch operations and its contract with Thyssen;

(o) Neither the Appellant nor Mr. Pletch performed services other than those referred to above;

(p) The Appellant did not provide tools in relation to the contract with Thyssen. The Appellant (Mr. Pletch acting on behalf of the Appellant) was provided an office in Toronto which Mr. Pletch did not use on a daily or regular basis. He did not use any assistants, not even the services of a secretary. All his expenses, which consisted largely of travel to various operations were reimbursed by Thyssen on being invoiced by the Appellant. While the Agreed Statement of Facts set out a wide range of responsibilities, the testimony of Mr. Pletch would suggest that most of his time on behalf of the Appellant was spent visiting managers of regional elevator operations owned by the Thyssen Group and assessing ways to improve profitability. Work performed for companies comprising the Thyssen Group was never distinguished from work for Thyssen per se even though the management contract was with Thyssen alone;

(q) While much of the testimony of Mr. Pletch would lead me to believe that Thyssen's business was run by its regional managers and that his role on behalf of the Appellant was to advise on improving operations, an area in which he had developed a real expertise, the Agreed Statement of Facts describes a broader role - a role consistent with that of a senior executive officer and one also admitted to in the testimony of Mr. Pletch;

(r) Remuneration payable to the Appellant, under its contract with Thyssen, was both fixed and performance based. Fixed amounts were \$12,500.00 monthly fees which were invoiced by the Appellant and the annual performance based compensation in each of the subject years resulted in total income each year of approximately three times the annual fixed amounts. Performance based compensation was calculated by Thyssen and was said to be based on turning around or improving the profitability of the companies for which Mr. Pletch, on behalf of the Appellant, had responsibility. Yet, I note that bonuses were based at least in part on consolidated profits and sales which suggests his remuneration was corporate performance based, not solely personal performance based;

(s) Neither the Appellant nor Mr. Pletch participated in employee benefit plans that were participated in by employees of the Thyssen Group. These plans included group life insurance, long and short term disability, pension and deferred profit sharing.

### Arguments

[4] Respondent's counsel relies on *Bruce E. Morley Corporation v. The Queen*,<sup>[3]</sup> as supporting the Respondent's position that the duties performed by Mr. Pletch under the subject contract are consistent with the duties he would be required to perform as an officer of Thyssen. That is, the role being performed by the Appellant corporation is that of an officer. That is all the subject provision of the *Act* requires: that Mr. Pletch (the incorporated employee) would be reasonably regarded as an officer but for the existence of the corporation. Indeed counsel for the Respondent went one step further in his argument and argued that the simple holding of an office by Mr. Pletch was fatal to the Appellant's case. He argued that removing the corporation from the picture, we are left with an officer. But for the existence of the corporation then it is reasonable to regard Mr. Pletch as an officer simply because he is. Respondent's counsel also relies on the common law tests that would distinguish contracts of service from contracts for services.

[5] Counsel for the Appellant relies on *Criterion Capital Corp. v. Canada*,<sup>[4]</sup> as supporting the Appellant's position that where the corporate contractor has business activities it is appropriate to regard its management services performed for Thyssen as a business activity of the Appellant company. The Appellant also relies on common law authorities which distinguish contracts of service from contracts that favour independent contractor status.

### Analysis

[6] The question posed by the definition of "personal services business" requires ignoring the existence of a corporation and examining the relationship of the worker and the party contracting for the work. That hypothetical relationship during the period under examination is determinative of the issue.<sup>[5]</sup> If under that analysis the worker could, considering the services performed, reasonably be considered as an officer as opposed to an independent contractor performing services distinguishable from services of an officer, then the imposition of the Appellant, as an intermediate party, would require a finding that the services of the intermediary, the Appellant, constituted a personal services business. That is the issue as framed by the decisions in *Morley Corporation* and *Criterion Capital*.

[7] In *Morley Corporation* the work performed by the corporation could not be distinguished from the work the incorporated worker was required to do as an officer of the corporation. In *Criterion Capital* the work performed by the corporation was distinguished from the work the incorporated worker was required to do as an officer of the corporation. In both cases separate contracts existed with separate compensation arrangements. In *Criterion Capital*, the division of services was recognized on the basis that the corporate intermediary had a distinct business operated for its own account that did not overlap with the executive work performed by the worker. The work performed was successfully separated. In *Morley Corporation* there was no division of services recognized, as the work performed by the corporate intermediary was the very work the worker was engaged to do as an officer. The case at bar falls somewhere in between the situations dealt with in these two decisions of this Court. In the case at bar, there appear to be distinct services capable of being separated. However, unlike the case in *Criterion Capital*, no attempt to separate services was made. All services including

executive services were provided by the Appellant. Unlike the case in *Criterion Capital*, Mr. Pletch received no compensation as an officer of Thyssen.

[8] While this case ultimately does, in my view, turn on the issue of whether the incorporated worker, Mr. Pletch, might, but for the existence of the Appellant corporation, reasonably be considered an officer (as opposed to any other type of employee), it is still necessary to consider the question of whether the relationship is one of independent contractor or employee ignoring both the corporate Appellant and Mr. Pletch's office. This is necessary because whether the title of an office is present or not, the real question is always whether the role of the corporation, considering the services actually performed by the worker for the corporation, can reasonably be regarded as consistent with or pertaining to the office (hypothetical or real) in a material and substantial way. [6] Posing the question this way ensures that a service provided by a worker outside of and unrelated to the corporate services engaged, do not cloud the issue. In considering whether the role of the corporation as performed by the worker can reasonably be regarded as consistent with or pertaining to the office, the nature of the services must be examined in the context of the relationship as a whole. If the relationship is one of independent contractor, it might not be reasonable to regard the corporate services as being consistent with or pertaining to an office. That determination is to be made following the guidelines set out in cases such as *Wiebe Door*[7], *Sagaz*[8] and others cited by the parties.[9]

[9] In *Sagaz* it was suggested that the central question in making the required determination is whether the worker is working as a person in business on his own account. In addressing this question the degree of control by the engaging party over the worker will always be a factor. Applying such test, I am faced with the frequently encountered problem of determining whether the independence in the performance of a role of a worker is attributable to the freedom that derives from the nature of the relationship, from the party in a position to control choosing not to exercise control or whether it is attributable to the nature of the tasks assigned and the worker's particular skills to perform such tasks without direction. In the case at bar the freedom of the worker derives primarily from the nature of the relationship which the worker imposed and from the worker's skills to perform the work. Notwithstanding that the agreement provides for the full-time engagement of Mr. Pletch, and notwithstanding that, in some instances at least, he goes where he is sent, it is clear that Mr. Pletch to some extent prescribes the times he is available to work. He takes more time than scheduled for vacations and works his time with Thyssen around his commitment to the Appellant's farming operations. The external demands on Mr. Pletch's time dictate a lesser degree of control over him than might otherwise attach to the relationship. Thyssen has accommodated Mr. Pletch in this regard. Further, the worker is largely left on his own with little control being exercised over him by Thyssen. He is clearly very capable and gives direction more than he takes direction. His primary role is to make recommendations as he sees fit and oversee their implementation. It is not his role to implement such recommendations. Implementing recommendations is the job of regularly employed managers. All this considered, the control factor favours a finding of independent contractor status. That Mr. Pletch has a broad range of duties and performs a management function does not in itself detract from such finding. Such finding however is not in itself determinative of the nature of the hypothetical relationship under examination. It is just one of a number of factors that must be considered.

[10] The following are factors favouring independent contractor status:

- (a) Mr. Pletch exercised independence in the performance of his responsibilities and was not responsible for implementing his recommendations;
- (b) Mr. Pletch was not dependent on Thyssen for the provision of tools. Here I put emphasis on the fact that while an office was made available, the manner in which he performed his duties negated any need for an office or office support of the type generally provided by an employer to an employee. I note that I put less emphasis on other tools such as the Appellant making a provision for a vehicle where the expense of same was reimbursed by Thyssen;
- (c) The historical setting of this appeal has some bearing on the case that might favour a finding of independent contractor. On the acquisition of the Appellant, a five-year management contract was entered into with one of the principals of the acquired company. It was an arm's length acquisition. It is not unusual in such circumstances that key personnel of an acquired company will be given management contracts to continue on in



an advisory capacity for a transitional period. Features of such independent contractor relationships might well be benchmarked by considerable freedoms afforded the outgoing management who are being required to stay on board for transitional purposes. This is an arguable position in the subject appeal at least at the outset of the relationship. Further, if the evidence of Mr. Pletch is accepted, that he was not an employee of Northern before the acquisition, then his role as a continuing independent contractor for the acquired company is tenable. However, this tends to beg the question. That is, that a similar role is being continued does little to define the nature of the relationship throughout the entire period;

(d) There is a chance of profit that is based on the success of Mr. Pletch's assigned duties. While the bonus provision was not well defined at the hearing, the general evidence tends to accord with the Agreed Statement of Facts at paragraphs 39 and 40. Some part of the bonus or incentive payments were based on measurements of profitability attributed to Mr. Pletch's initiatives and some part was based on the general profitability of the Thyssen Group. While the latter bonus payments are not inconsistent with employment bonuses for senior management and executives, the former bonus payments are not inconsistent with independent contractor compensation arrangements. Nonetheless, given the quantum of performance based bonuses relative to fixed retainer amounts, it must be acknowledged that there is a chance of profit in this case that might well support a finding of an independent contractor relationship;

(e) One of the primary functions of Mr. Pletch is his advisory role not necessarily tied to the duties of an office. This is supported by his independence. As well, I note that Mr. Pletch takes direction from Thyssen M.A.N. (a party to the management contract) and provides similar advisory services to companies of which he was not an officer or director under the umbrella of the management contract. Mr. Pletch also played a similar role for the Thyssen Group both during his presidency and after he was replaced as president. All of these factors support a function not necessarily tied to his role as a senior officer of Thyssen.

[11] The following are neutral factors:

(a) The Appellant had a business other than its contract with Thyssen. That business (farming) is unrelated however to the management services business it engaged in with Thyssen. The Appellant has no other management services business of which the contract with Thyssen might form part. Looking beyond the corporate existence of the Appellant, I note as well that Mr. Pletch has not established that he personally had a management business that, but for the existence of the Appellant, could be seen to include the contract with Thyssen. Paragraph 42 of the Agreed Statement of Facts suggests that he was an employee of the Appellant, not an independent contractor providing management services to the Appellant. Applying the "Whose business is it?" test or in answering the question of whether Mr. Pletch might be said to be operating a business for his own account, little stands out as supporting the position that Mr. Pletch was operating a business for his own account;

(b) It is clear that the parties intended an independent contractor relationship and it is clear that such intention has been given legal effect. That reality, however, cannot have a bearing in the determination of a hypothetical question. To suggest that intentions should be regarded as a factor is to miss the point of asking the hypothetical question unless it is clear that such intention does not derive from income tax considerations. Although purpose does not form part of the general body of law governing the interpretation of the *Act*, it is clear that the relationship targeted by the definition of "personal services business" cannot simply be a matter of choice;

(c) Recognizing that the management contract does, in reality, create an independent contractor relationship requires scrutiny of the applicability of certain factors normally considered in determining the nature of a contract of, or for, services. The best example of this is the risk of loss associated with a negligent performance of duties under a contract for services. That the Appellant assumes such risk and carries insurance for such risk flows from the legal reality of the relationship but same has little bearing in respect of the hypothetical question posed.<sup>[10]</sup> Another example is the lack of job security associated with independent contractor arrangements. Here Mr. Pletch enjoys no job security but this is a function of the legal reality of the arrangement. It does not necessarily speak to the hypothetical relationship.<sup>[11]</sup> Similarly, non-participation in employment benefit plans might also simply reflect the reality of the intended relationship having been given effect to without speaking loudly, if at all, to the hypothetical question. It is difficult in cases such as this to discern whether certain factors reflect the true nature of the hypothetical relationship or are simply a result of the actual legal relationship.



[12] The following are factors favouring employment status:

- (a) The enduring long-term nature of Mr. Pletch's relationship with Thyssen as a full-time worker is not consistent with an independent contractor carrying on business for his own account particularly in the circumstances of the present appeal where there is no evidence that either the Appellant or Mr. Pletch was engaged in similar activities with other clients;
- (b) The agreement provides for a fixed vacation period. This is consistent with a contract of full-time employment;
- (c) Mr. Pletch seemed to be very much an integral part of Thyssen's business. He looked after all of Thyssen's business in Canada (Mr. Pletch's testimony, subparagraph 3(j) above and the opening paragraph of the Amending Note). He assessed and supervised managers (Mr. Pletch's testimony, subparagraph 3(j) above). He was responsible for the non-financial operations of Thyssen (Agreed Statement of Facts, paragraph 27) and had, and exercised, the authority to direct the operations of the companies in the Thyssen Group (Agreed Statement of Facts, paragraph 29). His responsibilities included oversight of the production, sales and service operations and in some cases responsibility for collective bargaining (Agreed Statement of Facts, paragraph 34). He was subject to the board of director's direction and instruction (Agreed Statement of Facts, paragraph 30). He was responsible in part for the overall review of corporate operations including month-to-month operations, evaluation of key personnel and advising on new acquisitions (Agreed Statement of Facts, paragraph 33). On the departure of Mr. Elliot he assumed responsibility for manufacturing which was beyond his "consulting" role but was consistent with his office. Most of these roles are wholly compatible with duties assigned to senior executive officers who perform no business on their own account. Further, and importantly, Mr. Pletch understood that he was an executive with responsibilities to Thyssen to direct and supervise its affairs (Mr. Pletch's testimony, subparagraph 3(k) above). Given this acknowledgement, the freedom allowed Mr. Pletch might simply be seen as an accommodation to a valued executive who does what is required and expected of him - i.e. he does what the office demands of him without tight controls. He still works some 50 hours per week and performs his executive role enhancing the profitability of the party engaging him;
- (d) There is very little entrepreneurial risk associated with the worker's endeavours in terms of what is required as an investment under the contract. There is no infrastructure enabling more work of the type provided to Thyssen. Mr. Pletch is personally tied-up under the management agreement on a full-time basis leaving no room, without an infrastructure in place, to support the growth necessary to carry on any other similar business activities;
- (e) The absence of an investment by the Appellant or the worker in this contractual arrangement or related activity other than the worker's time, suggests little risk of loss. All expenses are reimbursed. Neither the worker nor the Appellant provide any tools, equipment or any infrastructure in respect of the engagement that are not reimbursed.

[13] At this point, I suggest that there is a definite tug-of-war going on in terms of applying the traditional tests to determine the nature of the subject hypothetical relationship. As noted, one of the primary functions of Mr. Pletch is his advisory role which is consistent with a contractor relationship. His independence and chance of profit are also consistent with a contractor relationship. On the other hand, Mr. Pletch performed a number of functions that clearly attach to an office and are necessarily an integral part of Thyssen's executive and operational structure. This is supported by the recognition of duties set out in paragraph 12(c) above. Mr. Pletch is the executive work horse of the Thyssen Group. While the "Whose business is it?" test applied from the worker's perspective is favoured over an integration test which asks the same question from the engager's perspective, the integration test might still have application in a case like this where it seems to speak loudly about a very significant and material aspect of the relationship. This is all to suggest that applying the common law tests to determine the nature of the relationship has not precluded a finding of an employment (officer) relationship notwithstanding the presence of a contractor type function.

[14] The corporate Appellant is wearing two hats here: the advisory hat and the executive hat. Under the latter hat, Mr. Pletch performs both roles on behalf of the Appellant but there has been no allocation of compensation

paid to the Appellant as the single performer of both services. Even if the services performed under the advisory hat might reasonably be regarded as independent contractor services I do not see how that finding, in this case, can assist the Appellant. The services of the Appellant have been merged into one source of income. A material and substantial part of such income pertains to the provision of executive services. That the parties made no effort to differentiate roles is fatal, in my view, to the Appellant's case. I see no room to suggest that the contract is divisible so as to create two sources of income nor was that argued by counsel.

[15] This leads me back to the principles posed above as derived from *Morley Corporation* and *Criterion Capital*. Neither the Appellant nor Mr. Pletch have a management services business outside the engagement with Thyssen and the services provided to the corporation materially and significantly overlap with, and include, Mr. Pletch's duties as a senior executive officer. Indeed, regardless of his title, the role performed by Mr. Pletch under the management contract was to a significant extent, that of a senior executive officer of Thyssen. His performance of that very real and material role has been subsumed into the contract engaging him through the Appellant as a corporate intermediary. This is not a case of bestowing a mere honorary title without associated duties.[\[12\]](#) That is, in the case at bar, Mr. Pletch not only *is* a senior executive officer of Thyssen, he actually performs that role. Considering such executive services are performed under the management contract on behalf of the Appellant, it is clear that but for the existence of the corporation, Mr. Pletch would be performing these services as an officer of Thyssen.

[16] To conclude, the Appellant's income from its contract with Thyssen is income from a personal services business. Accordingly the appeals are dismissed, with costs.

Signed at Ottawa, Canada, this 10th day of December 2005.

"J.E. Hershfield"

Hershfield J.

CITATION:2005TCC400

COURT FILE NO.:2002-3536(IT)G

STYLE OF CAUSE:W.B. Pletch Company Limited and

Her Majesty the Queen

PLACE OF HEARING:London, Ontario

DATE OF HEARING:June 3, 2005

REASONS FOR JUDGMENT BY:The Honourable Justice J.E. Hershfield

DATE OF JUDGMENT:December 10, 2005

APPEARANCES:

Counsel for the Appellant:David J. Thompson

Counsel for the Respondent:Peter M. Kremer, Q.C.

COUNSEL OF RECORD:

For the Appellant:

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Deputy Attorney General of Canada

Ottawa, Canada

Appendix "A"

AGREED STATEMENT OF FACTS

For the purposes of this appeal, the parties agree to the following partial statement of facts:

W.B. Pletch Company Limited

- 1) The Appellant is a corporation incorporated pursuant to the laws of Ontario on July 2, 1980 and maintains a fiscal year end of June 20 in each year.
- 2) Mr. W. Barry Pletch owns 50% of the issued and outstanding shares of the Appellant, and the balance of the shares are owned by his spouse.
- 3) Mr. W. Barry Pletch was at all material times a specified shareholder of the Appellant as that term is defined for the purposes of the definition of "personal services business" in subsection 125(7) of the *Income Tax Act*.

4) The Appellant carries on two activities, being cattle farming and the provision of management services (the "Services").

#### Cattle Farming

5) The cattle farming activity generated approximately \$3.5 million of gross revenue in 1998 and approximately \$4.3 million gross revenue in 1999.

6) The Appellant had \$4,054,725 and \$5,309,709 in farming assets in 1998 and 1999 respectively, excluding crops in the field, and operates on 1300 acres of non-contiguous farm properties.

7) The Appellant had 1,436 head of cattle at the end of the 1998 taxation year, and had 1,870 head of cattle at the end of the 1999 taxation year.

8) The Appellant had 1,072 acres under cultivation at the end of the 1998 taxation year, and had 1,170 acres under cultivation at the end of the 1999 taxation year, growing corn, barley, soybeans, and hay.

9) Mr. Pletch was involved with the farming operations of the Appellant every weekend and some nights. In the spring and fall of each year is involved with bringing in new cattle. His activities included checking on the pens and cattle, doing chores on the weekend, planting crops, harvesting are crops, and related farm activities. This undertaking involved six or eight weeks a year. He was responsible for the planting of 1200 acres of corn, 300 acres of beans, and a hundred acres of wheat. He was also responsible for the harvesting and combining. In the farming operation Mr. Pletch was assisted by three full time employees and his spouse.

10) When farming needs arose, Mr. Pletch gave priority to them over the rendering of services to Thyssen Elevator, but he arranged his affairs so as to avoid a conflict with his responsibilities to Thyssen Elevator.

#### Management Services

11) The Services activity generated \$460,541 gross revenue in 1998 and \$560,706 gross revenue in 1999.

12) The Services provided by the Appellant are in the nature of management services and advise through Mr. Pletch.

13) Only Mr. Pletch provided services to Thyssen Elevator under the Agreement.

14) In 1986, Mr. Pletch was a 10% shareholder of Northern Elevator Service Limited, as well as its president and a director.

#### The Services Agreement

15) Services were provided under a written agreement dated January 1, 1986 (the "Agreement") between the Appellant, Northern Elevator Service Limited, Thyssen, an unrelated German company, and Mr. Pletch in respect of the provision of the services of Mr. Pletch by the Appellant to Northern Elevator Service Limited.

16) The Services were provided to Thyssen Elevator Limited, formerly Northern Elevator Service Limited, and its affiliates (hereinafter referred to collectively as "Thyssen Elevator") in the taxation years under appeal.

17) The Agreement was for an original term of five years and has been renewed on an annual basis without formality.

18) The Appellant did not provide professional management services or advice to companies other than Thyssen Elevator.

19) The Agreement applied to the relationship between the Appellant, Northern Elevator, Thyssen Germany and Mr. Pletch during the taxation years under appeal, subject only to changes in the bonus and fee management.

### Pletch's Responsibilities to Thyssen Elevator

- 20) The Thyssen Elevator group is comprised of numerous corporations with operations throughout North America, and internationally.
- 21) Mr. Pletch was the president of Thyssen Elevator during a portion of the relevant taxation years, and was a director and an officer of Thyssen Elevator throughout the relevant period.
- 22) Mr. Pletch was replaced as president of Thyssen Elevator in the summer of 1999, however his responsibilities were substantially unchanged.
- 23) Mr. Pletch was a member of the Board of Directors of 7 companies in the Thyssen Elevator group.
- 24) Mr. Pletch provided services to 13 companies in the Thyssen Elevator group pursuant to the Agreement.
- 25) The services provided by the Appellant, or by Mr. Pletch, to companies other than Thyssen Elevator itself were treated by all parties as subject to the Agreement, and for greater clarity were not subject to any separate management agreements involving the Appellant or Mr. Pletch personally.
- 26) Mr. Pletch provided services on behalf of the Appellant without assistance, including secretarial assistance.
- 27) Mr. Pletch was responsible for non-financial operations of the corporation.
- 28) Each of the companies in the Thyssen Elevator group have their own boards of directors and corporate officers.
- 29) Mr. Pletch had and exercised the authority to direct the operations of the companies in the Thyssen Elevator group.
- 30) Mr. Pletch in the conduct of his duties and oversight responsibilities was subject to the broad direction and instruction received from the Board of Directors of the parent company in Germany.
- 31) Mr. Pletch exercised independence in the performance of his responsibilities under the Agreement.
- 32) Mr. Pletch received detailed financial statements and reports of all the operations of Thyssen Elevator. These records were kept at the Thyssen Elevator offices. Mr. Pletch kept copies of annual financial statements at his residence. Mr. Pletch used these financial reports as part of his decision-making process to determine who the poor performers were and for analysis.
- 33) Mr. Pletch was responsible in part for overall review of corporate operations for specifically identified entities; evaluation of key personnel; review of month-to-month operations; and advising on new acquisitions.
- 34) Mr. Pletch's responsibilities included oversight of the production, sales and service operations in Canada, the United States, and Mexico. His responsibilities also included in some cases responsibility for collective bargaining.

### The Fees Under the Agreement

- 35) The Agreement was never amended to incorporate changes to the bonus or fee arrangements.
- 36) The changes to the bonus and the arrangement were reflected in an agreement dated May 15, 1997.
- 37) The Appellant invoiced Thyssen Elevator on a monthly basis for a management fee of \$12,500, and expenses incurred by the Appellant and Mr. Pletch, during the 1998 and 1999 taxation years.

- 38) The management fee payable to the Appellant was not reduced or otherwise adjusted to the extent that Mr. Pletch was on vacation, took statutory holidays, or would otherwise reduce the time during which services were provided to Thyssen Elevator.
- 39) The Appellant further received an incentive payment directly related to the success that Mr. Pletch had in terms of turning around or improving the profitability of the companies for which he had responsibility. The Incentive Payments were determined by the auditor of the company and were paid in two installments annually.
- 40) The incentive payment was directly related to the profitability of the group of companies, and would not be paid if the profitability was not achieved, however there has never been a year in which an incentive payment was not received by the Appellant.
- 41) All payments received by the Appellant in respect of management fees and incentive payments were deposited to the bank account of the Appellant.
- 42) Mr. Pletch received compensation directly from the Appellant by way of salary, dividends, or other payments.

#### Benefits and Expenses

- 43) Mr. Pletch traveled extensively in the course of providing the Services to Thyssen Elevator on behalf of the Appellant.
- 44) Air travel arrangements for Mr. Pletch were booked and paid for directly by Thyssen Elevator.
- 45) Mr. Pletch use a personal credit card for hotels and related expenses while on Thyssen Elevator business, which expenses were billed by the Appellant to Thyssen Elevator.
- 46) Mr. Pletch devoted approximately 50 or 60 hours per week, excluding vacation, to the business and affairs of Thyssen Elevator in 1998 and 1999.
- 47) Pursuant to the Agreement between the Appellant and Thyssen Elevator, Mr. Pletch was entitled to four weeks vacation.
- 48) In the taxation years under appeal, Mr. Pletch took six to eight weeks vacation from the services provided to Thyssen. Mr. Pletch did not check with any other individuals at Thyssen Elevator for the purposes of scheduling vacation. He simply told them when he would take time off. In addition, Mr. Pletch took days off from time to time as he felt appropriate.
- 49) Thyssen Elevator does not carry liability insurance on behalf of corporate directors and officers, and Mr. Pletch is not covered by any such insurance.
- 50) Thyssen Elevator provided employees a range of benefits including dental benefits, deferred profit sharing, pension plans, medical benefits, and other benefits and perquisites of employment.
- 51) Mr. Pletch does not participate in any of the employee benefit plans of Thyssen Elevator.
- 52) The Appellant provides Mr. Pletch an automobile, and paid the expenses associated with the operation of the automobile and other expenses incurred carrying out the duties on behalf of Thyssen Elevator, for which the Appellant was reimbursed by Thyssen Elevator.
- 53) Mr. Pletch or the Appellant purchased a cell phone for his use while engaged on Thyssen Elevator business. The phone was likely charged to Thyssen Elevator by the Appellant, and Thyssen Elevator pays all charges related to their business.
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[1] Mr. Pletch's testimony at the hearing was inconsistent on this point however paragraph 22 of the Agreed Statement of Facts states that his responsibilities were substantially unchanged on being made vice-president.

[2] The evidence did not include sufficient details of the corporate structure as would allow me to identify all of those related companies. It is my understanding however that of the 13 related companies that I have referred to as the Thyssen Group at least five were Canadian and at least six were American. The five Canadian companies included Thyssen and the other four Canadian companies were directly or indirectly controlled by Thyssen. All companies were under the indirect control of Thyssen M.A.N.

[3] 2002 DTC 1547 (T.C.C.).

[4] 2001 T.C.J. No. 697.

[5] See *Dynamic Industries Ltd. and Her Majesty the Queen*, [2005] F.C.A. 211.

[6] This rejects the Respondent's alternative argument that the simple holding of an office is fatal to the Appellant's position.

[7] *Wiebe Door Services Ltd. v. M.N.R.*, [1996] 3 F.C. 553 (F.C.A.).

[8] *Sagaz Industries Canada v. 67112 Ontario Limited*, [2001] S.C.J. No. 61 (S.C.C.).

[9] *Wolf v. Canada*, [2002] F.C.A. 96; *Poulin v. Canada*, [2003] F.C.A. 50; *Precision Gutters Ltd. v. Canada*, [2002] F.C.A. 207; *S & C Ross Enterprises Ltd. v. Canada*, 2002 DTC 2078; [2002] 4 C.T.C. 2598; *Healy Financial Corporation v. The Queen*, 94 DTC 1705; *Moauero v. Canada*, [1991] T.C.J. No. 1113, 92 DTC 1071; *Kenneth Murray v. M.N.R.*, 87 DTC 559; *Scott v. The Queen*, 94 DTC 6193 (F.C.A.); *Meredith v. Canada*, [2002] F.C.A. 258; *Dewdney Transport Group Ltd. v. Canada (M.N.R.)*, [2004] F.C.A. 183.

[10] Mr. Pletch said he thought the Appellant carried insurance to cover the engagement with Thyssen.

[11] The management agreement provides for one year's notice.

[12] Appellant's counsel argued that Mr. Pletch needed an official title to give him the presence he would need to fulfil the management responsibilities he was engaged to perform on behalf of the Appellant. I find no support in the evidence for this position.