1166787 Ontario Limited v. The Queen

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Judges and Taxing Officers: Valerie A. Miller
Subjects: Income Tax Act

Docket: 2005-2522(IT)G

BETWEEN:

1166787 ONTARIO LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 2, 2007 at Toronto, Ontario

Before: The Honourable Justice Valerie A. Miller

Appearances:

Counsel for the Appellant:	Paul L. Schnier
Counsel for the Respondent:	Lesley L'Heureux

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the taxation years ended January 31, 1997, January 31, 1998, January 31, 1999, January 31, 2000, January 31, 2001 and January 31, 2002 is dismissed in accordance with the attached Reasons for Judgment.

The Respondent is awarded its costs in both the motion and this appeal.

Signed at Ottawa, Canada this 8th day of February, 2008.

"V.A. Miller"

V.A. Miller, J.

Citation: 2008TCC93
Date: 20080208
Docket: 2005-2522(IT)G

BETWEEN:

1166787 ONTARIO LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller, J.

[1] This is an appeal from reassessments of income tax for the Appellant's taxation years ended January 31, 1997, January 31, 1998, January 31, 1999, January 31, 2000, January 31, 2001 and January 31, 2002. At all relevant times the Appellant earned and reported income from services performed for Signature Vacations Inc. ("Signature") and in particular its cruise division known as Encore Cruises ("Encore"). The Minister of National Revenue ("Minister") reassessed the Appellant on the basis that it was a personal services business as defined in subsection 125(7) of the *Income Tax Act* ("*Act*").The definition reads as follows:

> "personal services business" carried on by a corporation in a taxation year means a business of 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] It was agreed by both parties at the hearing that Vanessa Lee ("Lee") could properly be regarded as the incorporated employee of the Appellant. It was also agreed that paragraphs (c) and (d) of the definition were not applicable in this appeal as the Appellant neither employed more than five full-time employees throughout any of the years under appeal nor was the Appellant associated with Signature. The only issue to be decided in relation to the definition is whether Lee would reasonably be regarded as an officer or employee of Signature but for the existence of the Appellant. If so, the Appellant's income would not qualify as active business income and as such the Appellant would not qualify for the small business deduction under subsection 125(1) and would only be eligible for limited deductions under paragraph 18(1)(p) of the *Act.*

FACTS

[3] The Appellant was retained by Signature "to manage, supervise and direct the business and affairs" of Encore which is a tour operator selling cruise vacation packages in Canada. In this regard, the Appellant and Signature entered into a Consulting Agreement ("the 1996 Agreement") dated December 1, 1996 which terminated on October 31, 2000. The parties entered into a subsequent Agreement on November 1, 2000 ("the 2000 Agreement"). These Agreements governed the relationship between the Appellant, Lee and Signature for the periods under appeal.

[4] The events that led up to these Agreements are as follows. Lee had been involved in the travel industry since 1976. Her involvement consisted of selling tours to travel agents who in turn sold the tours to consumers. She worked in Canada, Australia and England. In 1981 she learned about the cruise business when she became employed by Paramount Holidays which was a Canadian tour operator. Prior to 1991, Lee's involvement in the travel industry was that of an employee and not a consultant. In 1991, Lee and her former spouse came up with the idea for the business which became Encore. They formed a partnership known as Apex Travel Associates ("Apex"). They developed the business model, the business plan, and the name for Encore. However, they did not have the money necessary to start the business. Lee and her former spouse contacted a long-time colleague at Akard Enterprises Ltd. ("Akard") who assisted them. Encore became an unincorporated division of Akard. (Akard was known by the public trading name of

Adventure Tours. Its trading name was later changed to Signature.) Apex entered into a Consulting Agreement with Akard on May 1, 1991. This Agreement endured until 1996 and was similar to the 1996 Agreement and 2000 Agreement.

[5] In 1994, Lee and her spouse separated and in 1996 her spouse decided to leave the Apex partnership. On January 31, 1996, Lee had the Appellant incorporated and it entered into the 1996 Agreement with Signature. In each of the Agreements, Signature is referred to as "the Corporation". The 1996 Agreement provided for the following:

(a) The preamble reads as follows:

> WHEREAS the Corporation carries on the business of marketing and selling cruise vacation packages in an unincorporated division operating under the name and style Encore Cruises (the "Cruise Division");
>
> AND WHEREAS Vanessa Lee ("Lee") has extensive experience in the business of cruise wholesaling and tour operating (the "Cruise Business") and 1166787 has agreed to provide the services of Lee to the Corporation in accordance with the terms and conditions hereof;
>
> AND WHEREAS in reliance on such agreement by 1166787, the Corporation has agreed to retain 1166787 to provide services to the Corporation: …

(b) The Appellant was engaged by Signature to manage, supervise and direct the business and affairs of Encore for the period from December 1, 1996 to October 31, 2000. There was a provision for automatic renewal of the 1996 Agreement for three years as long as one of the parties to the Agreement had not given written notice to terminate the Agreement and had not committed a material breach of the Agreement. The Agreement also provided that if Lee died, the 1996 Agreement automatically terminated and the Appellant was not entitled to renew it. As well, the Appellant agreed to enter into a contract with Lee, imposing duties and obligations substantially similar to those imposed on the Appellant, and Signature was entitled to the benefit of such contract. These provisions demonstrate just how integral Lee was to Signature's cruise business.

(c) According to the 1996 Agreement, Lee had to devote substantially all of her time and energy to the performance of the Appellant's duties to Encore. The Appellant had to supply information and reports to Signature as and when requested. The remuneration for the services was based on an annual base fee which was paid in advance in equal monthly instalments. There were provisions for annual raises and annual cost of living increases to the base fee. As well, the Appellant was entitled to receive an annual bonus which was calculated as a percentage of the net profits of Encore. Signature paid the Appellant GST on all fees, bonuses and reimbursements of expenses.

(d) Lee was entitled to receive her base fee during a period of disability as defined in the 1996 Agreement. There was no reduction in the Appellant's bonus if Lee was prevented by illness from performing her duties. Article 2.3 provided the following:

> 2.3 Death or Disability: (1) If, after Lee has been prevented by illness or physical or mental disability or otherwise from performing her duties to 1166787 for a period of two (2) consecutive

months or periods aggregating four (4) months in any twelve (12) month period (the "first disability period"), she is then within the 36 months following the commencement of the first disability period, again prevented by illness or physical or mental disability or otherwise from performing her duties to 1166787 for a period of two (2) consecutive months or periods aggregating four (4) months in any twelve (12) month period (the "second disability period") the then current base fee pursuant to this Article 2 shall thereafter be retroactively reduced by fifty percent (50%) for the actual periods in which she was prevented from performing her duties comprised in the second disability period but there shall be no reduction in participation by 1166787 in net profits pursuant to Section 2.1 hereof, unless there has been a material breach by 1166787 which has not been waived or cured as provided in Section 4.3. If, after the second disability period, Lee is prevented by illness or physical or mental disability or otherwise from performing her duties to 1166787 for a period of two (2) consecutive months or periods aggregating a further four (4) months in any subsequent twelve (12) month period (the "third disability period"), the then current base fee shall be retroactively reduced to zero for the actual periods in which she was prevented from performing her duties comprised in the third disability period, but there shall be no reduction in participation by 1166787 in net profits pursuant to Section 2.1 hereof. The parties acknowledge and agree that the reduction in base fee provided for hereunder may result in an obligation on 1166787 to return funds to the Corporation and, for greater certainty, the parties agree that any such amounts owing may be withheld from subsequent payments to 1166787, whether for base fee or profit payments.

(e) The Appellant had to prepare an annual budget with respect to the performance of its obligations under the Agreement. It was entitled to receive reimbursement for all travelling, entertainment and other expenses actually and properly incurred on behalf of Encore up to the maximum amount provided for in the budget and for which receipts were presented.

(f) The Appellant and Signature intended an independent contractor relationship and there was a provision to that effect in the Agreement.

(g) Article 6 of the Agreement contained non-competition covenants. Two of those convenants are as follows:

6.2 Non-Competition: During the term of this Agreement and (i) for fifteen months following the Trigger Date in the case of a voluntary termination by 1166787 of its engagement under subsection 4.1 and an election under (ii) of that subsection to cease its duties prior to the expiry of the one year's notice period; or (ii) in the case of a Sale Notice, the period set out in Section 6.5; and (iii) in all other cases for one year following the Trigger Date, 1166787, Lee and all other employees of 1166787 shall not engage, directly or indirectly, in any line of business that competes, directly or indirectly, with the business that is carried on by the Cruise Division during the period up to the termination of this Agreement at any time during the term of this Agreement, or become engaged or employed by any person, firm or corporation that competes, directly or indirectly, with the business carried on by the Cruise Division at any time during the term of this Agreement within Canada and any other jurisdiction where the Corporation is carrying on Cruise Division business, except such activities as are specifically approved in writing in advance by the Corporation, acting reasonably.

…

6.6 Directorships: Notwithstanding Sections 6.2 and 6.3 hereof, Lee or other employees of 1166787 may serve as directors of other companies which may compete with the business of the Cruise Division provided that such Lee or such other employees have obtained the prior written

consent of the Board of Directors of the Corporation, which consent is not to be unreasonably withheld.

[6] The 2000 Agreement was substantially the same as the 1996 Agreement except that it stipulated that the Agreement was between Signature, the Appellant and Lee. As well, it contained a non-delegation clause whereby the Appellant could not delegate the performance of its duties and obligations under the 2000 Agreement to anyone except Lee without the prior written consent of Signature. There was evidence that only Lee performed the Appellant's duties and obligations. During the period under appeal the Appellant had only one employee and that was Lee. There was no longer a provision for an annual cost of living increase but the Appellant was entitled to receive an annual increase of $5,000 during the initial term of the 2000 Agreement to a maximum annual base fee of $210,000. The initial term of the 2000 Agreement was three years. Subject to the same conditions as were contained in the 1996 Agreement, the 2000 Agreement was automatically renewed for a further three years. The 2000 Agreement also provided for the following:

(a) Under Article 4, entitled "TERMINATION AND PAYMENTS FOLLOWING TERMINATION", one of the material breaches is as follows:

> 4.1(b)(iii) Termination by the Corporation for Material Breach:
>
> ... For purposes hereof "material breach" shall be limited to:
>
> (iii) Lee having excessively absented herself from her duties of employment without leave of the Corporation, other than by reason of illness or disability, provided that the Corporation shall give Lee a period of ten (10) days to rectify any such absenteeism; or

(b) Under Article 9 the parties agreed that the Appellant was an independent contractor and the Appellant would indemnify Signature against any and all liabilities arising out of any act on its part or that of Lee. However, the Appellant did not buy any insurance policies to protect itself in the event that it was called upon to indemnify Signature.

[7] Lee is the sole officer, director and shareholder of the Appellant. Lee was the only witness called on behalf of the Appellant. In direct examination she tried to minimize the time she spent in the office at Encore, the work performed and her interactions with the employees of Encore and Signature. When she was questioned by the Respondent's counsel, Lee was evasive and at times gave answers contrary to those given at the discovery held prior to the hearing of this appeal. I accept the evidence read in from the discovery transcript as representing the true state of affairs. One matter Lee did not want to admit at the hearing was that in accordance with the 1996 Agreement and the 2000 Agreement, she spent substantially all of her time and energy in fulfilling the Appellant's obligations under the Agreements. At the discovery she had confirmed that she had worked in accordance with the provisions of the Agreements. When Respondent's counsel asked Lee about her duties with Encore, Lee offered no details except that her "responsibilities were to manage, supervise and direct the Cruise Division and make it successful and profitable". In response to questions concerning the disability and the remuneration provisions, Lee stated that "whatever is in the Agreement is the fact". I infer from the fact that the 2000 Agreement could only

be amended in writing, and no amendment to the Agreement was entered in evidence, and the fact that the Appellant's revenues increased substantially during the relevant time, that for the periods under appeal, Signature was satisfied with Lee's performance of her duties and that Lee performed the duties in accordance with the Agreements. The Appellant's revenues from Signature increased from $21,667 in 1997 to $600,297 in 2002.

[8] Encore represented a number of cruise lines such as Royal Caribbean, Celebrity Cruises and Cunard Lines in Canada. It was Encore's responsibility to increase the sales for these cruise lines by working with retail travel agencies. It assisted with advertising, marketing and promotion of these cruise lines. Lee negotiated with the key executives in the cruise lines and the retail travel agencies to promote the marketing concepts of Encore. She travelled extensively and some years she spent an average of three to four months travelling. Her evidence was that she did site inspections on ships and that she, along with some people from Encore, met with the retailers.

[9] Lee stated that within Encore, she managed, supervised and directed the course of its day-to-day business. She stated that there were senior directors that formed a strong management team at Encore. The management team ran the day-to-day business. She stated that the management team was composed of four senior directors in the following areas: finance, sales and marketing, a reservations call center and operations. Lee was the managing director at Encore and as such it was her responsibility to meet with the management team and "help direct the business". It is my opinion that Lee was also part of the management team of Encore. In fact, she was the Managing Director of Encore. Lee's business card identified her as being the "Managing Director" of Encore with a telephone number, a fax number and an email address at Signature. There were no other business cards presented into evidence. Lee also had an email address at Encore Cruises.

[10] Lee, in conjunction with the Chief Financial Officer (CFO) of Encore, provided an annual budget to Signature for approval. As well, Lee provided monthly written reports to Signature on the state of the business of Encore. She also had meetings with the officers of Signature but there was no set timetable for these meetings.

[11] The Appellant was paid in accordance with the 1996 Agreement and the 2000 Agreement. Lee stated that the Appellant invoiced Encore monthly in advance for its compensation. In addition to the annual base fee, the Appellant also received a bonus which was calculated as a percentage of the net operating profits of Encore. For the year ended October 31, 2000 the Appellant received the amount of $381,480 as its bonus.

[12] Lee had cheque signing authority on Encore's bank account. Each cheque required two signatures. Lee had authority to sign contracts on behalf of Encore. She had the use of an office at Encore but this office was also used for meetings when she was away. The Appellant did not have an office. Lee stated that she had home offices in both her city and country homes. These offices contained a desktop computer, a printer, fax machine and telephone. She stated that she used her own car and cell phone in the performance of her duties.

[13] Some of the answers to the undertakings given on the discovery of Lee were as follows:

Undertaking:

To provide a description of the business activities of 1166787 Ontario Limited other than with respect to Encore Cruises and amounts received in respect of same.

Answer:

Other business activities included consulting and mentoring with individuals on entrepreneurship and how to start and manage a business. Ms. Lee, on behalf of 1166787 Ontario Limited made numerous appearances at trade shows, seminars and conferences in order to promote the business of 1166787 Ontario Limited and, in particular, advised female entrepreneurs on how to manage and grow a business. Unfortunately, we do not have the records which would reflect the amounts received in respect of these activities.

Undertaking:

To advise of the specific provision in the December 1996 Consulting Agreement which creates a liability on the part of 1166787 Ontario Limited to Encore.

Answer:

There is no specific provision akin to Section 9.2 of November 1, 2000 Consulting Agreement; however, the liability in the December 1996 Agreement is implicit in the setoff contained in Section 4.5 of the Agreement and the other provisions of this Agreement.

Undertaking:

To advise as to any limitations on Ms. Lee's cheque signing authority.

Answer:

Ms. Lee cannot sign any cheques on her own as all cheques require two signatures.

Undertaking:

To provide a breakdown of the promotion expenses for the 2001 and 2002 taxation years.

Answer:

We are still attempting to get this information from the accountant and will provide it as soon as it is available.

Undertaking:

To attempt to find out the names of any employees who previously worked for 1166787 Ontario Limited other than Ms. Lee.
Answer:

Unfortunately, we were not able to find this information in the Appellant's records.

No other answers were provided by the Appellant prior to the hearing of this appeal.

[14] As a result of the answers to the undertakings and the evidence presented at the hearing, I find that during the periods under appeal, Lee was the only employee of the Appellant. It hired individuals on a contract basis to complete its GST returns and its income tax returns. I also find that during the relevant times, neither the Appellant nor Lee performed services for remuneration other than those services performed in accordance with the 1996 Agreement and the 2000 Agreement. I find also that the Appellant earned all of its revenues from its Agreements with Signature.

[15] There was evidence from the portion of the discovery transcript that was read into evidence that the Appellant is not a recognized name in the cruise business. Lee's name is recognized in Canada as being an expert in the cruise industry. Many cruise lines have sought to associate with Encore in order to benefit from Lee's expertise.

LAW

[16] The definition of "personal services business" in paragraph 125(7)(b) of the *Act* poses a hypothetical question in that it requires one to ignore the existence of a corporation and to examine the work relationship of the person and the party for whom the services were provided. In this appeal the hypothetical question is whether Lee would reasonably be regarded as an officer or employee of Signature but for the existence of the Appellant.

[17] The test to be used in making a determination under paragraph 125(7)(b) of the *Act* was succinctly stated by Sharlow J.A. in *Dynamic Industries Ltd. v. Canada*, [2005] 3 C.T.C. 225 (F.C.A.) at paragraph 50 as follows:

> This case requires consideration of *Wiebe Door Services Ltd. v. Minister of National Revenue*, [1986] 3 F.C. 553, [1986] 2 C.T.C. 200, 87 D.T.C. 5025 (Fed. C.A.) and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 (S.C.C.), the leading cases in which the central question is whether an individual is providing services to another person as an employee, or as a person in business on his or her own account. I refer to this as the "*Sagaz* question" (*Sagaz*, paragraph 47). The factors to be taken into account in determining the *Sagaz* question will depend upon the particular case, but normally they will include the level of control the employer has over the worker's activities, whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management undertaken by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

ANALYSIS

[18] In order to perform the required analysis and to consider the hypothetical question posed by paragraph 125(7) of the *Act,* I am mindful of the following comments from Associate Chief Justice Bowman (as he then was) in *Page v. M.N.R.*, 2004 TCC 211:

> [26] Before dealing with the letter, however, I should preface my comments with a couple of observations. We are all familiar with the four-in-one test expressed by MacGuigan, J. in *Wiebe Door Services Ltd. v. M.N.R.,* [1986] 3 F.C. 553 - ownership of tools, control, chance of profit and risk of loss.
>
> [27] There is also the "organization" or "integration test". In the multitude of cases that have come before this Court and the Federal Court of Appeal, to the extent that the integration test is comprehensible at all, I have yet to see it applied as a decision or even a helpful factor. One must also be careful about mechanically applying the other factors. A skilled senior employee, particularly a professional, may well be subject to no control by the employer, supply his or her own tools and may well be paid an incentive that will determine how much money he or she makes. The existence of these factors will not prevent the person from being an employee if the overall picture that emerges is that of employment.
>
> …
>
> [37] In deciding cases of this type a trial judge must endeavour to steer a course between Scylla and Charybdis. The judge must avoid the slavish and mechanical application of the four elements in the *Wiebe Door* test without standing back and looking at the overall picture that emerges. On the other hand, the judge must look at the relationship as a whole but nonetheless keep an eye on the elements in the *Wiebe Door* test. It is a fine balancing act.

[19] When I consider all of the evidence that was presented in this appeal, the overall picture that emerges is one of employment. The payment of an annual base fee, paid monthly in advance and the payment of a bonus are more indicative of a contract of employment for an executive than for an independent contractor who has her own business. If Lee died while the Agreements were still in effect, the Appellant was still entitled to receive a portion of the net profits of Encore. The allowance for an annual increase and an annual adjustment for inflation are exactly the type of incentives that one would pay to an employee.

[20] In the event of the sale of Signature or of Encore the Appellant could not terminate the Agreements until after the sale date and then it had to give three months notice of its intent to terminate. As well if the Appellant did give notice to terminate the Agreement after the sale date, the Appellant was entitled to receive a lump sum amount.

[21] The Appellant was entitled to receive its base fee or a percentage of it during a period that Lee was disabled and could not perform her duties with the Appellant. Lee paid Signature to be covered under its Health Plan. All of these provisions are indicative of an employee relationship.

[22] In *Alexander v. M.N.R.*, 70 DTC 6006, Jackett, P. stated this at page 6011:

> ... On the one hand, a contract of service is a contract under which one party, the servant or employee, agrees, for either a period of time or indefinitely, and either full time or part time, to work for the other party, the master or the employer. On the other hand, a contract for services is a contract under which the one party agrees that certain specified work will be done for the other. A contract of service does not normally envisage the accomplishment of a specified amount of work but does normally contemplate the servant putting his personal services at the disposal of the master during

> some period of time. A contract for services does normally envisage the accomplishment of a specified job or task and normally does not require that the contractor do anything personally.

[23] That Lee had to spend "substantially all of her time and energy" in the performance of the Appellant's obligations under the Agreements; that the Appellant could not delegate the performance of its duties under the Agreements to anyone but Lee; that neither the Appellant nor Lee could engage in any line of business that competed with Encore either during the Agreements or for a period of time after the termination of the Agreements; and that Lee could not serve as a director or officer of any corporation that competed with Encore unless Lee had received the written consent of Signature, clearly indicate a contract of service.

[24] The only evidence that indicated that the Appellant was in business on its own account was that it collected GST and invoiced Encore. In fact, there was evidence that the Appellant was not known in the tourist industry and that people did business with Encore so that they could benefit from Lee's expertise. I view this as a statement that the people in the tourist industry thought of Lee as being employed by Encore.

[25] When I examine the evidence with the factors from *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 D.T.C. 5025 (FCA) in mind, I also conclude that Lee can reasonably be considered to be an employee of Signature.

[26] In the present case, the control factor relates to the right that Signature had to direct the manner in which Lee performed her duties as opposed to whether that right was exercised by Signature. See *Gagnon v. The Minister of National Revenue*, 2007 FCA 33 at paragraph 7. In her testimony Lee stated that she decided how, when and what to do in the performance of her duties. When asked if anyone at Signature told her what to do, her answer was: "Not essentially, no." Lee's response does not address whether Signature had the right to direct the manner in which she performed her duties. Interestingly, the 1996 Agreement addresses Signature's right to control the manner in which Lee or the Appellant performed the services as follows:

> As an independent contractor, 1166787 shall be solely responsible for determining the means and methods of performing the Services within the overall schedule and standards established by the Corporation and subject to the terms and conditions of this Agreement.

[27] Lee was hired for her expertise in the travel industry and in particular for her knowledge of the cruise business. The business plan, the business model and the strategy for the cruise business were hers. She was hired as the Managing Director of Encore. It was only because of Lee and her former spouse that Encore was established. All this considered, one would not expect that Signature would dictate the manner in which Lee had to perform her duties. Lee was engaged to manage, supervise and direct the business of Encore for and on behalf of Signature. The independence Lee had with respect to how she did her work is no different from the independence that competent professional employees are granted by their employers.

[28] The Appellant had no risk of loss in the performance of its duties under the Agreements. Signature agreed to reimburse the Appellant all expenses incurred in the performance of its duties and obligations under the Agreements. The Appellant received a monthly fee paid in advance of Lee performing any duties. Lee had an incentive to work harder and make Encore successful as the Appellant's bonus was based on a percentage of the net profits of Encore. This is not the commercial risk or chance of profit that a proprietor has for running her own business.

[29] Signature provided the tools that Lee needed to perform the duties under the Agreements. The only tool that Lee provided that did not duplicate tools supplied by Signature was a car. The evidence failed to establish that Lee needed a car to perform the duties.

[30] The Supreme Court of Canada in *Sagaz* made it clear that the factors from *Wiebe Door* are not exclusive tests but are to be given weight according to the circumstances. The main question is to determine if Lee can reasonably be considered to be an employee of Signature or if she is in business on her own account. I have very little difficulty in concluding that Lee was not in business on her own account and that she could reasonably be considered to be an employee of Signature.

[31] Although I do not think that intention is relevant to the test under subsection 125(7) out of an abundance of caution I will discuss it. See *Lang v. Canada (Minister of National Revenue - M.N.R.)*, 2007 TCC 547. In the Agreements the Appellant and Signature provided that the Appellant was an independent contractor. However, I think that the *Wiebe Door* factors show the true intentions of the parties. This is not a close case where the stated intention of the parties can determine the status of the engagement (*Robert Dempsey v. Canada (Minister of National Revenue -M.N.R.)*, 2007 TCC 362).

[32] At the conclusion of the hearing the Appellant's counsel raised the issue of the award of costs. Prior to the hearing of this appeal the Appellant made a motion to this Court to strike some of the paragraphs pled as assumptions of fact. This motion was denied and the motions judge left the matter of costs to the trial judge. In this appeal the Appellant has asked for costs in any event of the cause on the following basis:

a) Most of the assumptions of fact made by the Minister of National Revenue ("Minister") were derived from the 1996 Agreement and the 2000 Agreement and consequently they were not facts but were conclusions of law;

b) The auditor who was assigned this file did little work as he spoke to no one except Lee and her counsel;

c) The Appellant had made an offer to settle this appeal. It would agree that the Appellant was a personal service business if the Respondent would allow the Appellant to deduct certain expenses under paragraph 18(1)(a) instead of paragraph 18(1)(p) of the *Act*.

[33] With respect to the assumptions of fact, the Appellant made the same argument to Justice Campbell at the hearing of the motion and the motion was dismissed. I take it that Justice Campbell disagreed with counsel. He cannot retry the motion before me.

[34] Terri Costantino, an appeals officer with the Canada Revenue Agency ("CRA"), appeared as a witness on behalf of the Respondent. When questioned by Mr. Schnier, counsel for the Appellant, she stated that the assumptions of fact in the Reply to Notice of Appeal were taken from the provisions in the 1996 Agreement, the 2000 Agreement and statements made by Lee and her

counsel. She was also asked questions about the auditor's handling of the file. She stated that according to the auditor he visited the offices of Signature and tried to speak to "individuals" at Signature. She also stated that: "In the times that he tried to speak to those individuals, he was redirected to speak to Vanessa Lee".

[35] The auditor did as much as he could to audit the tax returns of the Appellant. It was not incumbent on the auditor or the appeals officer to try to speak to everyone with whom Lee worked. It was incumbent on Lee to give the information to the employees of CRA. It must be remembered that in Canada we have a self-assessing and self-reporting system of taxation. As Justice Rip (as he then was) stated in *McVey v. Canada.,* [1996] 2 C.T.C. 2157, 96 DTC 1225 at paragraph 53:

> 53 Our tax system is a self-assessing one. It is the taxpayer, who, almost to exclusivity, has personal knowledge of the facts. The Minister must rely on the representations of taxpayers and it is reasonable for the taxing authority to prepare assessments in accordance with information given to her by taxpayers.

[36] In conclusion, the appeal is dismissed and the Respondent is awarded its costs in both the motion and this appeal.

Signed at Ottawa, Canada this 8th day of February, 2008.

"V.A. Miller"

V.A. Miller, J.

CITATION: 2008TCC93

COURT FILE NO.: 2005-2522(IT)G

STYLE OF CAUSE: 1166787 Ontario Limited v. The Queen

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 2, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice Valerie A. Miller

DATE OF JUDGMENT: February 8, 2008

APPEARANCES:

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