Docket: 2015-983(EI)

BETWEEN:

HANS HARRY FELIX,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on October 22, 2015, at Toronto, Ontario.

Before: The Honourable Associate Chief Justice Lucie Lamarre

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	Annie Paré

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is dismissed and the decision rendered by the Minister of National Revenue on November 12, 2014, is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 2nd day of December 2015.

"Lucie Lamarre"

Lamarre A.C.J.

Translation certified true
on this 14th day of January 2016.

Elizabeth Tan, Translator

Citation: 2015 TCC 293
Date: 20151202
Docket: 2015-983(EI)

BETWEEN:

HANS HARRY FELIX,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Lamarre A.C.J.

[1] The appellant is appealing from a decision by the Minister of National Revenue (**Minister**) that he was not employed in insurable employment within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* (**EIA**) with Experis Manpower Group, a division of Services Manpower Canada Ltd. (**Manpower**), for the period from July 9, 2012, to March 15, 2013 (**period in question**).

[2] The evidence shows that the appellant incorporated a company in January 2010, under the name 7307101 Canada Inc. (**corporation**), of which he is the sole shareholder and director. This corporation operates a business that provides information technology consultation services.

[3] On July 3, 2012, the corporation, represented by the appellant, signed a contractual agreement ("Independent Contractor Agreement"**)** with Experis (a division of Manpower) under which the corporation agreed to render services to any person designated by Experis, at an hourly rate set out in the agreement (Exhibit I-1, tab 2). Experis provides the services of specialized consultants in information technology, finance and accounting, and engineering.

[4] Under this agreement, the corporation made a commitment to Experis that services would be rendered by the appellant—who is referred to as the "Service

Delivery Consultant"—to the client (HP) during the period in question (Exhibit I-1, tab 2, paragraphs 2 and 4).

[5] The appellant described Experis as a placement agency that provided his services to HP. He said he was recruited to work for HP because he was bilingual and had technical experience. He was responsible for the networking systems of an HP client (CIBC). He said he followed a specific work schedule and recorded his hours in a computer system developed for this purpose.

[6] Manpower paid the corporation's fees by direct deposit to a bank account in the corporation's name. Sales tax was paid in addition to the fees.

[7] The hours of work could vary from one week to another, as could the fees paid to the corporation (Exhibit I-1, tab 6). The appellant noted that he could take leave as needed, for personal reasons. The agreement signed with Experis did not prevent the appellant from working elsewhere. The appellant did, however, mention that after he started working at HP, HP made him sign a contract that prevented him from working elsewhere. This contract was not submitted in evidence.

[8] The appellant submits that Experis required that the contractual agreement be signed with the corporation, otherwise he would not have been hired. He referred to a woman named Lisa Balks, but she was not called to testify.

[9] This was contradicted by Nadia Ciani, Vice President of Human Resources at Manpower, who testified at the request of the respondent. She stated that Manpower signed contracts with both individuals and companies. She noted that Manpower had informatics employees and the appellant did not dispute this. She noted that if the contract was signed by the appellant's corporation, it must have been with the appellant's consent.

[10] Additionally, the appellant submits that he obtained a decision from the Ontario Ministry of Labour allegedly confirming that he held employment with HP during the period in question. However, only one of the documents submitted as Exhibit A-1 (moreover, this document was unsigned) indicates that the appellant submitted a claim for amounts related to his work for HP. No decision regarding his claim was produced. The appellant enclosed an email Ms. Ciani sent him on August 23, 2013, regarding a $3,750 deposit, in which she mentions that she received a "release" with the appellant's signature. However, this email does not refer to the claim the appellant allegedly submitted for his work with HP and the

deposit does not correspond to the amount claimed. Ms. Ciani was not asked any questions about this subject either.

[11] The appellant also called Éric Michel Menie to testify regarding an alleged complaint he submitted that was successful (Exhibit A-3). However, it is not related to the appellant's case. Additionally, Mr. Menie testified that he had also been contacted by Manpower. He stated that it was suggested he set up a corporation, but he did not confirm whether it was a requirement to work with them.

[12] The respondent submits that the appellant was fully aware that he was agreeing to render services through his corporation, according to a contractual agreement, at the time the agreement was signed. By signing this agreement, he knew and agreed that he would render services not as an employee but as a self-employed worker.

[13] The respondent submits that the services were rendered by the appellant's corporation and therefore, he was not hired under a contract of service either by Manpower or his own corporation.

[14] A person cannot be employed in insurable employment by a corporation if that person controls more than 40% of the shares (paragraph 5(2)(*b*) EIA):

> Types of insurable employment
>
> 5. …
>
> Excluded employment
>
> (2) Insurable employment does not include:
>
> …
>
> *(b)* the employment of a person by a corporation if the person controls more than 40% of the voting shares of the corporation.

[15] Moreover, the respondent notes that the appellant could not be considered an employee of the placement agency under the terms of paragraph 6(*g*) of the *Employment Insurance Regulations* (**Regulations**) because the agreement with the placement agency Manpower was not signed by him, but by the corporation. Paragraph 6(*g*) states the following:

> **6.** Employment in any of the following employments, unless it is excluded from insurable employment by any provision of these Regulations, is included in insurable employment:
>
> …
>
> (*g*) employment of a person who is placed in that employment by a placement or employment agency to perform services for and under the direction and control of a client of the agency, where that person is remunerated by the agency for the performance of those services.

[16] The respondent also submits that the appellant wished to ignore his corporation and conclude that since he was the one to render the services, it was he who held insurable employment. However, the corporation's existence cannot simply be ignored.

[17] The respondent referred to *The Queen v. Jennings*, Federal Court of Appeal, A-113-93, June 15, 1994, [1994] F.C.J. No. 953 (QL) and cited the following passage:

> 2 Ironically, it is not the Minister who seeks to pierce the so-called "corporate veil" but rather the taxpayer. The applicant maintains that the respondent and his corporation are separate legal entities and that "the normal rule of a corporation being a separate and distinct legal entity from its shareholders [should apply in the case at bar]"; per Iacobucci C.J. (as he then was) in The Queen v. MerBan Capital Corporation Limited, 89 DTC 5404 at 5410 (F.C.A.). On this issue, the decision of the Supreme Court of Canada in Kosmopoulos v. Constitution Insurance Co., [1987] 1 S.C.R. 2, is instructive. Writing for the majority (McIntyre J. concurring), Wilson J. observed at pages 10-11:
>
> > The law on when a court may disregard [the principle of separate corporate entities] by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue"....
> >
> > There is a persuasive argument that "those who have chosen the benefits of incorporation must bear the corresponding burdens, so that if the veil is to be lifted at all that should only be done in the interests of third parties who would otherwise suffer as a result of

> that choice".... Mr. Kosmopoulos was advised by a competent solicitor to incorporate his business in order to protect his personal assets and there is nothing in the evidence to indicate that his decision to secure the benefits of incorporation was not a genuine one. Having chosen to receive the benefits of incorporation, he should not be allowed to escape its burden. He should not be permitted to "blow hot and cold" at the same.
>
> [Emphasis added.]

> 3 Having regard to the meagre evidence adduced below and the limited arguments tendered by the respondent (who is unrepresented), we are all of the view that the Tax Court judge erred in law in permitting the losses of one legal entity to be used to offset the income of another. Only in the clearest of cases, and in compelling circumstances and after thorough legal analysis could the "normal rule" be displaced…

[18] Moreover, the respondent cited *Meredith v. Canada*, 2002 FCA 258, [2002] F.C.J. No. 1007 (QL):

> **11** In my analysis, the Judge committed several errors in the disposition of this case. First of all, the Judge "pierced the corporate veil" insofar as he looked beyond the corporate entity itself to assess the applicant's actions. Examples are sprinkled thought the reasons for judgment. For instance, he held that, notwithstanding the contractual relationship between the third parties and Stem, that it was "obvious that Roeslein and Ball were hiring [Meredith's] expertise and not retaining the Company as such in that it had no other workers." He also stated that "it is apparent that [Meredith] controls the Company and uses it for his own benefit from time to time when it is convenient. The Company does not use him." Further, he also made reference to the methods by which Meredith was paid by Stem, as well as arrangements Stem had with its bank, including personal guarantees provided by Meredith.
>
> **12** Lifting the corporate veil is contrary to long-established principles of corporate law. Absent an allegation that the corporation constitutes a "sham" or a vehicle for wrongdoing on the part of putative shareholders, or statutory authorisation to do so, a court must respect the legal relationships created by a taxpayer (see *Salomon v. Salomon & Co.,* [1897] A.C. 22; *Kosmopoulos v. Constitution Insurance Co. of Canada,* [1987] 1 S.C.R. 2). A court cannot re-characterize the *bona fide* relationships on the basis of what it deems to be the economic realities underlying those relationships (see *Continental Bank Leasing Corp. v. The Queen,* [1998] 2 S.C.R. 298; *Shell Canada Ltd. v. The Queen,* [1999] 3 S.C.R. 622*; Ludco Enterprises Limited v. the Queen,* 2001 SCC 62 at para. 51)…

Analysis

[19] In *1392644 Ontario Inc.* (*o/a Connor Homes*) *v. Canada*, 2013 FCA 85, [2013] F.C.J. No. 327 (QL), which involved determining whether the workers were employees or independent contractors, the Federal Court of Appeal stated that the first step was to establish the subjective intent of each party to the relationship (paragraph 39). Here, I consider that the appellant failed to show that he did not intend to sign a contractual agreement with Experis on behalf of his corporation. It was the corporation, which he incorporated two years earlier, that was remunerated for the services rendered and it collected the goods and services tax. Moreover, considering the testimony of Manpower's representative, which was not contradicted in cross-examination or by the testimony given by Mr. Menie, who was called to the stand by the appellant, I cannot conclude that Manpower required the contract to be signed by the appellant's corporation.

[20] Additionally, the second step is to establish whether the objective reality confirms the relationship of client to contractor-representative in the contractual agreement (*Connor Homes*, paragraph 40).

[21] Again, I do not feel that the appellant provided evidence that the contractual agreement did not reflect the legal reality between the parties. As noted above, I am not convinced, considering the evidence provided, that the appellant signed the agreement on behalf of his corporation because he was required to. He rendered services to his own corporation, which in turn, rendered services to clients designated by Experis.

[22] It was the corporation that collected the fees from Experis and collected taxes on the fees. By rendering services to his own corporation, the appellant could not hold insurable employment (paragraph 5(2)(*b*) EIA). He could also not be deemed to be holding insurable employment under section 6 of the Regulations because he was not hired by the placement agency (Experis), his corporation was, and it was paid for the services rendered to Experis's client (HP).

[23] Moreover, the evidence provided does not establish that the Ministry of Labour considered the appellant to be an employee of Manpower during the period in question.

[24] For all these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 2nd day of December 2015.

"Lucie Lamarre"

Lamarre A.C.J.

Translation certified true
on this 14th day of January 2016.

Elizabeth Tan, Translator

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APPEARANCES:

For the appellant	The appellant himself
Counsel for the respondent:	Annie Paré

COUNSEL OF RECORD:

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Name:

Firm:

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