Docket: 2008-1146(IT)I

BETWEEN:

ALEXANDER MACINTYRE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on October 21, 2009, at Halifax, Nova Scotia

Before: The Honourable Justice G. A. Sheridan

Appearances:

Counsel for the Appellant:	Gerard Tompkins
Counsel for the Respondent:	Jan Jensen

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2002 and 2003 taxation years are dismissed.

The appeal from the reassessment made under the *Income Tax Act* for the 2004 taxation year is allowed, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to business expenses, as claimed, for that year.

It is further ordered that the filing fee of $100 be refunded to the Appellant.

Signed at Victoria, British Columbia, this 20th day of January, 2010.

"G. A. Sheridan"

Sheridan J.

Citation: 2010TCC27
Date: 20100120
Docket: 2008-1146(IT)I

BETWEEN:

ALEXANDER MACINTYRE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] In 2002, 2003 and 2004, the Appellant was employed as a ship's pilot by the Atlantic Pilotage Authority ("APA"). He was scheduled to work every other week ("Scheduled Weeks") in the Halifax Harbour and was paid a flat salary. He also had the option of accepting assignments for pilotage services during weeks he was not scheduled to work ("Unscheduled Weeks"). For such services, he received a percentage of the fees the APA charged to ships requiring pilotage.

[2] In the taxation years under appeal, the Appellant worked during both Scheduled Weeks and Unscheduled Weeks. During those years, he reported his salary from the Scheduled Weeks as employment income; his earnings from assignments performed during Unscheduled Weeks, he treated as business income on the basis that he had performed such work for the APA as an independent contractor.

[3] The Minister of National Revenue reassessed on the basis that the Appellant was at all times working as an employee of the APA. The Minister included the Unscheduled Weeks' earnings in the Appellant's employment income and disallowed the business expenses claimed in all years.

[4] In order to understand the nature of the Appellant's work, regard must be had to the federal *Pilotage Act*[1], the *Atlantic Pilotage Tariff Regulations, 1996*[2], and the Collective Agreement[3] between the pilots' union, the Canadian Merchant Service Guild (the "Guild") and the APA.

[5] The *Pilotage Act* provides for the establishment[4] and sets out the powers of port authorities across Canada. The port authority for the Atlantic region is the APA and its powers include the licensing[5] and discipline[6] of pilots.

[6] The APA also has the authority to designate by regulation[7] an area of the Atlantic coastal waters as a "Compulsory Pilotage Area" in which ships are required to have a pilot on board, or as a "Non-Compulsory Pilotage Area", where they are not. In the present case, the Halifax Harbour is designated as a Compulsory Pilotage Area. Sheet Harbour, where the Appellant most frequently accepted assignments during Unscheduled Weeks is a Non-Compulsory Pilotage Area.

[7] Finally, the *Pilotage Act* obliges the APA, with the approval of the Governor-in-Council, to prescribe a formula for the calculation of tariffs to be paid to the APA for various pilotage charges, including pilots' expenses and the use of APA equipment, such as pilot boats.

[8] As an employee of the APA, the Appellant was required to be a member of the Guild. In each of the years under appeal, the APA and the Guild were parties to a Collective Agreement pursuant to which the APA recognized the Guild as the exclusive bargaining agent of its pilots[8] and was authorized to deduct membership and other dues from the pilots' monthly pay.

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[1] S.C. 1970-71-72, c. 52, as amended.

[2] *SOR/95-586,* August 27, 2009.

[3] Exhibit R-1, Tabs 1 and 2.

[4] Section 3.

[5] Sections 22-32.

[6] Sections 18-21.

[7] *Atlantic Pilotage Tariff Regulations, 1996,* Section 2.

[8] Article 1.01.

[9] The Collective Agreement is a comprehensive document which addresses a wide range of matters affecting a pilot's work with the APA including leave, job security, remuneration, pensions, duty rosters, dispute settlement and pilotage outside of regular compulsory pilotage areas. Those of particular relevance to this appeal are set out below:

> Article 2.01
>
> (f) **"Director"** means the Director of Operations of the [APA] or his representative;
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> …
>
> (i) **"Pilot"** means any person holding a licence as a pilot and employed by the [APA] to perform the duties of same … .
>
> **…**
>
> Article 8.01 The Director shall have the direction of pilots … and, in this regard, may make orders for the effective carrying out of the provisions of this Agreement.

[10] One of the Director's duties is to draw up duty rosters[9] for the pilots, in consultation with the pilots' Area Committee[10]. Pursuant to Article 26.04, the normal practice is for the Director to assign pilots for duty as their names appear on the roster; under Article 26.03, a pilot on the duty roster is required to keep the Director informed of his whereabouts. Article 27 sets out specific requirements as to when, where and for how long a pilot may be assigned to work in Compulsory Pilotage Areas.

[11] Returning to Article 8 of the Collective Agreement, that provision also sets out when a pilotage assignment is considered to be completed and requires pilots to report the completion of each assignment to the APA, whether working during Scheduled Weeks or Unscheduled Weeks:

> Article 8.04 A Pilot may terminate the pilotage assignment undertaken as soon as the vessel is finally anchored or safely moored at its intended destination or as near thereto as safety permits.

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[9] Article 26.01.

[10] Article 9.01.

> Article 8.04(a) As soon as possible after completing an assignment, a pilot shall make every effort to notify the [APA's] Dispatcher of his status.
>
> Article 8.05 When a pilot is authorized to be absent from his normal tour of duty for the provision of services in non-compulsory pilotage areas, he shall report, on an acceptable form, to the [APA] upon his completion of the assignment, indicating the period of time he was absent from the Duty Roster.

[12] Article 20.01 confers on the APA a general discretionary power over a pilot's ability to accept assignments in addition to his Scheduled Weeks:

> Article 20.01 No pilot shall engage in any employment or undertaking that will, in the opinion of the [Chief Executive Officer of the APA[11]], interfere with his regular duties as a pilot.

[13] Of particular importance to the present appeal is Article 28 which bears the heading "Pilotage Outside of Regular Compulsory Pilotage Areas":

> Article 28.01
>
> (a) Pilots performing assignments outside their regular compulsory pilotage area do so in their capacity as employees of the [APA].
>
> (b) The parties agree to meet in consultation to mutually establish a roster of volunteer pilots to perform such pilotage assignments.
>
> (c) Pilots who agree to such assignments will receive a fee equivalent to eighty-five (85%) of the total pilotage charges excluding pilot boat charges, travel expenses and recall charges.

[14] Article 30 is entitled "Remuneration" and sets out details of the pilots' remuneration including, in the attached Schedules, their annual salaries according to their seniority and the Compulsory Pilotage Area to which each is assigned.

[15] Returning, then, to the facts of the present case, because the Halifax Harbour is designated as a Compulsory Pilotage Area, a ship in such waters is required by federal law to have a pilot on board. In such circumstances, the ship's owner or, more typically, its agent requests pilotage services from the APA. The APA then assigns

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[11] Article 2.

that task to a pilot on the Halifax Harbour duty roster. Upon completing his assignment, the pilot is required to complete a form[12] supplied by the APA setting out, among other things, the information required for the calculation of the tariff. The form must be signed by the pilot and the ship's master and be submitted to the APA. The APA then invoices the ship's agent and is responsible for collecting any amounts billed.

[16] During the years under appeal, the Appellant accepted assignments during his Unscheduled Weeks in Non-Compulsory Pilotage Areas, most frequently, in Sheet Harbour, Nova Scotia. Although a ship in a Non-Compulsory Pilotage Area is not legally required to have a pilot on board, if it elects to do so, the pilotage services performed are no different in kind from those provided by a pilot working in a Compulsory Pilotage Area. Similarly, the procedures for obtaining a pilot to work in a Non-Compulsory Pilotage Area are essentially the same as those in Compulsory Pilotage Areas. The only real difference lay in the manner in which the Appellant was informed of the assignment and the nature of his remuneration.

[17] For Non-Compulsory Pilotage Area work, the Appellant would typically be contacted about the assignment directly by the ship's agent rather than through the APA. This was not because a different procedure applied to Non-Compulsory Pilotage Area work but because the Appellant was well known to those in the field and enjoyed an excellent reputation as an experienced pilot. It was simply a matter of convenience to communicate directly with the Appellant. The APA did not object to this practice.

[18] As for his remuneration, rather than a fixed salary, the Collective Agreement provided that the Appellant was entitled to be paid a percentage of the pilotage charges billed to the ship. As was the case for his work in the Halifax Harbour, the APA was responsible for billing the ships for the Appellant's services in Non-Compulsory Pilotage Areas but did not pay the Appellant for such work until the fees had been recovered from the ship. The Appellant could not recall ever having not been paid for his work mainly, he said, because he and the APA dealt primarily with reputable ship's agents.

[19] As a pilot, the Appellant was not obligated to work out of the business office of the APA. Upon receiving an assignment, whether in the Halifax Harbour or a Non-Compulsory Pilotage Area, his practice was to go directly from his home to the point of embarkation for the ship.

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[12] *Regulations*, s.28.

[20] During the taxation years under appeal, the Appellant maintained a home office and claimed business expenses in respect of it. In addition to the usual office furniture and equipment, the office included professional journals and texts as well as charts and maps used in pilotage. The APA did not require the Appellant to maintain a home office and indeed, refused his request to provide him with a signed form T-2200 that would have permitted him to deduct certain office expenses as an employee.

Analysis

[21] Whether the Appellant was working during his Unscheduled Weeks as an employee or an independent contractor must be considered in light of the four-fold test established in *Wiebe Door Services Ltd. v. The Minister of National Revenue*[13] and applied in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*[14]:

> [47] Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, *supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include 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 held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> [48] It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[22] The Court may also take into account the degree to which the worker is integrated into the payor's business and intention of the parties[15].

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[13] 87 DTC 5025.

[14] [2001] 2 S.C.R. 983.

[15] *Lawrence Wolf v. Her Majesty the Queen*, 2002 FCA 96, 2002 DTC 6853; *The Royal Winnipeg Ballet v. The Minister of National Revenue*, [2006] F.C.J. No. 339, (F.C.A.); *City Water International Inc. v. Canada (Minister of National Revenue)*, 2006 FCA 350, [2006] F.C.J. No. 1653; *Kilbride v. Canada*, 2008 FCA 335, [2008] F.C.J. No. 1524.

[23] The Appellant's position is that he was working for the APA during his Unscheduled Weeks as an independent contractor. The bases for this contention are dealt with separately below under the relevant headings.

Control and Tools

[24] Counsel for the Appellant submitted that the factors of control and tools were of little assistance in determining the question of whether the Appellant was an employee or an independent contractor. By its very nature, he argued, the work of ship's pilot is inconsistent with the imposition of control by a supervising entity. Similarly, the pilot's chief "tool" is the expertise and experience he brings to the job.

[25] While I agree with counsel that the tools element of the test is not helpful in the analysis of his status, the same cannot be said for the control factor. Although I accept that no representative of the APA supervised the Appellant in the actual performance of his pilotage duties, I am not persuaded that the APA did not exercise or have the right to exercise control[16] over the Appellant in his work as a pilot.

[26] A review of the terms of the *Pilotage Act* and the Collective Agreement set out above shows that the APA had both general and specific powers over the Appellant's capacity to work as a pilot and the manner in which he carried out his duties as such. Because it was not necessary for someone acting as a pilot to be licensed in a Non-Compulsory Pilotage Area, that aspect of the APA's general authority is not relevant to the present facts. However, because the Appellant *was* a licenced pilot, it follows that he was, in principle, subject to the APA's disciplinary authority regardless of where he was working as a pilot.

[27] Turning, then, to the Collective Agreement, Article 8.01 conferred on the APA a general power to ensure that pilots complied with the provisions of the Collective Agreement which, under Article 28, specifically included his work in Non-Compulsory Pilotage Areas. Another example of the APA's control over the Appellant is found in Article 20 under which the APA had the discretion to prohibit a pilot from engaging in "any employment or undertaking" that interfered with his "regular duties as a pilot". These provisions are broad enough in scope to have

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[16] *Baptist v. Her Majesty the Queen,* [2000] 2 C.T.C 2829, (T.C.C.), at paragraph 20; affirmed, [2001] 4 C.T.C. 168, (F.C.A.).

fettered the Appellant's ability to accept assignments in a Non-Compulsory Pilotage Area under Article 28. Further, the Appellant was required under the Collective Agreement to report to the APA in respect of the completion of his work in a Non-Compulsory Pilotage Area and was dependent upon the APA for the payment of his fees for such work. Indeed, it was the APA that was charged by the *Pilotage Act* with the duty of setting the tariffs. On balance, the evidence in respect of control favours a finding of employee status.

Integration, Chance of Profit/Risk of Loss and the Intention of the Parties

[28] These three elements were treated together in the submissions of counsel for the Appellant. Relying on the analysis of former Chief Justice Bowman in *Lang v. Minister of National Revenue*[17] for the proposition that the integration factor is "for all practical purposes dead"[18], counsel argued that when weighed against the Appellant's chance of profit, the extent of the Appellant's integration into the business of the APA had little significance: the Appellant had an absolute right to decide whether to accept work during his Unscheduled Weeks; the more he worked, the greater his income became. He submitted that the intention of the parties ought to be given, if not precedence, at least great weight in determining the Appellant's status when working in Non-Compulsory Pilotage Areas during Unscheduled Weeks. On this latter point, counsel urged the Court to disregard what he characterized as the "confusing" language of Article 28 in favour of the testimony of the Appellant and the representative of the APA, Mr. MacArthur, to the effect that the parties did not intend the Appellant's work during Unscheduled Weeks to be part of his employment with the APA.

[29] I must say I am not at all persuaded by counsel's submissions. First of all, I am unable to follow the logic of counsel's assertion that because the Appellant was free to choose whether to accept work in Non-Compulsory Pilotage Areas, little weight should be given to the extent to which he was integrated into the APA. Furthermore, I do not share his confidence that the death knell has been finally tolled for integration as a relevant consideration. While in many cases this element of the test may be tricky to apply, in the present appeal, I have no hesitation in concluding that the Appellant's work in Non-Compulsory Pilotage Areas arose from his employment in the business of the APA.

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[17] 2007 TCC 547, 2007 DTC 1754. (T.C.C.).

[18] Above, at paragraph 34.

[30] The most compelling evidence of this can be found in the Collective Agreement between the APA and the Guild in which a pilot is, by definition, an "employee". In that document, the parties dealt with all aspects of a pilot's employment, including the circumstance of a pilot choosing to accept assignments in Non-Compulsory Pilotage Areas. Article 28.01(a) expressly provides that such work is done by pilots "in their capacity as employees of the [APA]". Like counsel for the Respondent, I am unable to find anything ambiguous in that language. The thrust of the provision is to remove any uncertainty regarding a pilot's status as an employee while engaged in "voluntary" assignments in Non-Compulsory Pilotage Areas. This could be important, for example, in preserving a pilot's entitlement to such employee benefits as the "injury-on-duty" leave described in Article 12. Under Article 28.01(b), the APA was obliged, as it is for Compulsory Pilotage Area assignments under Article 26, to maintain and manage a duty roster for pilots who agree to accept APA assignments in Non-Compulsory Pilotage Areas. Finally, Article 28.01(c) deals with the manner in which pilots will be remunerated for their work "outside of Regular Compulsory Areas".

[31] Given the comprehensive nature of the Collective Agreement in general and Article 28 in particular, there is no getting around the fact that the Appellant's opportunity to earn additional income during Unscheduled Weeks was firmly rooted in his employment contract. He generated those earnings, not by establishing a freelance pilotage service with individual ship's agents in unregulated waters (which, according to the Appellant, some local fishermen did) but rather, by simply availing himself of his rights under the employment agreement with his employer.

[32] Turning then, to the twin elements of chance of profit and risk of loss, there is no dispute that the Appellant increased his earnings by accepting pilotage assignments during his Unscheduled Weeks. While having the freedom to accept or refuse work can be synonymous with having a chance of profit, in the present case, the source of the Appellant's right to choose lay in his employment contract; namely, Article 28.01 of the Collective Agreement which describes work in Non-Compulsory Pilotage Area as "voluntary". The jurisprudence is also clear that something more is required to satisfy the notion of profit than merely the opportunity to take on extra work[19]. The profits must arise from the taxpayer's efforts to generate income from a business conducted on his own account; this necessarily implies a risk of loss. On this point, the Appellant was candid in his testimony that there was little risk of not being

[19] *City Water International Inc. v. Canada (Minister of National Revenue),* 2006 FCA 350 at paragraph 24. (F.C.A.)

paid for his work in Non-Compulsory Pilotage Areas; indeed, it was the very reliability of such remuneration that made it so attractive. In his final submissions on behalf of the Appellant, counsel himself argued that:

> … there was no repercussion to [the Appellant] if he chose not to take on any more of this work but he certainly had the incentive of knowing that it was very risk free. That he was going to get paid if he got up at four in the morning to go to Sheet Harbour in a snow storm that he was going to get his money."[20]

[33] And the "money" he ultimately got was derived from activities more akin to voluntary overtime under an employment contract[21] than the operation of a business separate from that of the APA. While the Appellant was not required to accept work during Unscheduled Weeks, when he did, the APA was obliged to collect the applicable tariff (which, it must be remembered, the APA had a statutory duty to set) from the ship's agent and was required by the Collective Agreement to pay the Appellant a percentage thereof for his services. All the Appellant had to do was signal his availability and the money would follow.

[34] In these circumstances, I am satisfied that not only did the Collective Agreement have the effect of fully integrating the Appellant's performance of pilotage services during Unscheduled Weeks into the business of the APA but it also removed any element of profit or loss from such work.

[35] That leaves, then, the matter of the intention of the parties. While both Mr. MacArthur and the Appellant were entirely credible witnesses, their testimony regarding the intention of the parties is not, in itself, determinative of the issue. The question of intention must be considered in light of all the evidence, not the least of which, in the present case, is the Collective Agreement. The facts of this appeal are quite different from the more typical case where the parties' testimony regarding their understanding of their working relationship may provide the best evidence of their intention: for example, where there is no written agreement, or where one exists but, for one reason or another, its terms do not reflect the true nature of their relationship. Here, there was a written agreement drafted by sophisticated parties who, presumably, had the benefit of legal representation.

[36] The Collective Agreement is premised on the existence of an employer-employee relationship between the APA and its pilots. It is clear on its face that it is a

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[20] Transcript, page 117 at lines 15-21 inclusive.

[21] As in the *Baptist* case, above.

contract of employment that addresses all aspects of their rights and obligations in respect of the Appellant's work, including that performed during Unscheduled Weeks in Non-Compulsory Pilotage Areas. In these circumstances, I am not persuaded that it would be appropriate to look beyond the parameters of the Collective Agreement to determine the intention of the parties.

[37] Even if I am wrong in this conclusion, the oral evidence of the Appellant and Mr. MacArthur does nothing to supplant the clear wording of the Collective Agreement. That the Appellant treated his earnings from work during Unscheduled Weeks as business income and the APA did not object to that practice falls short of converting it to a contract for services. Though they both testified that the APA had not made any employment insurance or Canada Pension Plan deductions from his earnings during Unscheduled Weeks, that was merely because the maximum amount permitted had already been reached under the salaried portion of the Appellant's earnings. It was not the result of any agreement, either explicit or implicit, that the Appellant was working as an independent contractor. Although counsel for the Appellant contended that Article 28 was ambiguous, neither of the witnesses challenged the validity of that provision or the Collective Agreement as a whole. Indeed, their description of the practices normally followed by the Appellant and the APA in respect of both Compulsory Pilotage Area and Non-Compulsory Pilotage Area work mirrored their rights and obligations under the Collective Agreement. Finally, it must be remembered that the Collective Agreement applied not just to the Appellant but to all other employee pilots of the APA; thus, intention must be considered in that more general context.

[38] All in all, the Appellant has failed to meet the onus of showing that he was operating his own business as an independent contractor when performing pilotage services in Non-Compulsory Pilotage Areas during his Unscheduled Weeks. Accordingly, the appeals of the 2002 and 2003 taxation years are dismissed.

[39] In respect of the 2004 taxation year, at the hearing of the appeal, counsel for the Respondent advised the Court that in making his reassessment of that year, the Minister had erroneously disallowed the business expenses claimed by the Appellant. As shown by paragraph 6(m) of the Reply to the Notice of Appeal, the Minister had assumed that the Appellant was operating another business in 2004 that was not in connection with the APA; accordingly, counsel for the Respondent conceded that the Minister ought to have allowed the expenses claimed by the Appellant for that year. On that basis only, the appeal of the 2004 taxation year is allowed and referred back to the Minister of National Revenue for reconsideration and reassessment.

Signed at Victoria, British Columbia, this 20th day of January, 2010.

"G. A. Sheridan"

Sheridan J.

CITATION:	2010TCC27
COURT FILE NO.:	2008-1146(IT)I
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APPEARANCES:

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