Ivan Cassell Limited (Appellant) V. Her Majesty The Queen (Respondent), 2016 DTC 1048

October 07, 2016

Facts: The taxpayer was appealing reassessments that denied its claim for a small business deduction and limited expenses claimed on the basis that it was providing services as a "personal services business" ("**PSB**"). The taxpayer was incorporated by Ivan Cassell ("**Cassell**") in 1983 to operate a home comfort centre for Imperial Oil. After several years, the taxpayer began working for Ultramar for about six years as a supervisor, looking after all the independent retail agents of Ultramar located on the west coast of Newfoundland and southern Labrador.

In 1990, Cassell left Ultramar and bought an area of retail business from them outside the major urban centres of Newfoundland. Cassell began growing Cassell Limited's ("**ICL**") retail oil and gas business by acquiring several gas stations in areas that the major oil companies were leaving. The retail oil and gas business of ICL was carried on under the business name Western Petroleum ("**WP**").

In 2005, Western Petroleum Newfoundland Limited ("**WPNL**") was incorporated and ICL transferred its WP business to WPNL and the business expanded throughout Newfoundland. Over the years, the Cassell provided services to WPNL in his capacity as president of ICL and was, at the same time, the president and director of WPNL.

At issue were the services provided by Cassell to WPNL in his capacity as president of ICL. The services were provided under an oral agreement and included banking, negotiating contracts, and dealing with suppliers.

Held: The appeal was dismissed.

Should Cassell be reasonably regarded as an employee but for the existence of ICL, the small business deduction is not available to ICL and the PSB provisions would apply. The PSB provisions are designed to deny tax advantages that may be obtained by providing services through a corporation rather than personally.

There is no one conclusive test or determinative factor but issues of control, risk of loss and opportunity for profit are to be considered.

The stated objective of Cassell providing services to WPNL was to grow its business with no mention of ICL's business. There was no written agreement between ICL and WPNL, no HST was charged on fees paid by WPNL and ICL did not advertise its services. ICL leased gas stations to third parties, distinct from their providing management services, which generated income for WPNL. When the tenants were delinquent in paying rent, they were not pursued for the rent so that WPNL would continue to gain revenue. The profitability of WPNL took precedence over the earning of rent by ICL, confirming that Cassell's focus was solely on the profitability of WPNL's business. The court reasoned that someone in business on his own account would not have such a focus.

Furthermore, the functions performed by Cassell after the transfer to WPNL were the same as those performed by him as a senior employee of ICL. Any opportunity for profit was tied to the success of WPNL and there was limited exposure to risk of loss. In fact, the expenses incurred by ICL were minuscule in comparison to the monthly fees it received from WPNL and should the existence of ICL be ignored, then Cassell would not bear any real risk of loss under the compensation arrangements with WPNL. In other words, the only substantive economic risk faced by ICL was the risk inherent in WPNL's business, which governed WPNL's ability to pay the monthly fees.

Moreover, Cassell had the use of a company car and had a makeshift desk to work at when he went into the office. Although there was no direct control of Cassell's activities he had weekly meetings at WPNL which is consistent with the degree of control that might be exerted over a senior employee of WPNL.

All factors considered, if the existence of ICL were ignored, there is no evidence of business-like activity to support the conclusion that Cassell would reasonably be regarded as providing the services as a person in business on his own account.

For those reasons, the Court affirmed that the small business deduction was properly denied.

By

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