Docket: 2012-1000(IT)I

BETWEEN:

GOMEZ CONSULTING LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 8, 2013, at Ottawa, Canada

Before: The Honourable Justice Paul Bédard

Appearances:

Agent for the Appellant:	Luis Gomez Almeida
Counsel for the Respondent:	Christopher Kitchen

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2007, 2008 and 2009 taxation years are dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 30th day of April 2013.

"Paul Bédard"

Bédard J.

Citation: 2013 TCC 135
Date: 20130430
Docket: 2012-1000(IT)I

BETWEEN:

GOMEZ CONSULTING LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bédard J.

[1] On September 14, 2010, the Minister of National Revenue (the "Minister") issued reassessments of the Gomez Consulting Ltd.'s (the "appellant") tax liability and thereby disallowed its claim for the small business deduction in calculation of its tax liability for the 2007 and 2008 taxation years and disallowed the deduction of expenses in the amounts of $10,000, $8,341, and $9,613 for the 2007, 2008 and 2009 taxation years, respectively. The Minister concluded that the appellant was a personal services business during the taxation years in issue and, consequently, disallowed the small business deductions claimed by the appellant pursuant to subsection 125(1) of the *Income Tax Act* (the "Act") and disallowed the said expenses claimed by the appellant in accordance with paragraph 18(1)(*p*) of the Act. The Minister concluded that the appellant was a personal services business on the basis that if it was not for the existence of the appellant, Mr. Luis Gomez Almeida could reasonably be regarded as an employee of Canada Revenue Agency ("CRA") and Canada Mortgage and Housing Corporation (the "Clients"), the entities to which the services were provided. The said reassessments are now appealed from.

[2] In determining the appellant's tax liability for the relevant period, the Minister relied on the following assumptions of facts (which are enumerated in para. 10 of the Reply to Notice of Appeal):

a. during the relevant period, Luis Gomez Almeida was an employee and sole shareholder of the appellant **(admitted)**

b. during the relevant period, the appellant had only two employees, Luis Gomez Almeida and his spouse Maria J. Riviere **(admitted)**

c. the appellant carried on a business of providing information technology ("IT") consulting services **(admitted)**

d. the appellant entered into agreements with AQR Management Services Inc. ("AQR") for the provision of computer related services by Luis Gomez Almeida to the Canada Revenue Agency ("CRA") and to the Canadian Mortgage and Housing Corporation ("CMHC") as follows: **(admitted)**

Date	**Clients**	**From**	**Up to**
March 11, 2006	CRA	March 20, 2006	June 30, 2007
May 1, 2006	CRA	July 1, 2006	May 31, 2007
May 1, 2007	CMHC	May 1, 2007	December 31, 2007
June 1, 2008	CRA	June 16, 2008	March 31, 2009

e. the Clients authorized the work to be done **(admitted)**

f. the Clients authorized the ours to be spent on the work **(denied)**

g. Luis Gomez Almeida was required to report to the Clients' premises **(admitted)**

h. Luis Gomez Almeida performed the work under the Clients' control and direction **(denied)**

i. the services provided were to be provided by Luis Gomez Almeida and could not be assigned **(denied)**

j. Luis Gomez Almeida recorded his hours on timesheets **(admitted)**

k. the Clients approved Luis Gomez Almeida's timesheets **(admitted)**

l. the Clients had to authorize any overtime that was worked **(admitted)**

m. Luis Gomez Almeida was paid at a specific daily rate for 7.5 hours worked per day **(denied)**

n. Luis Gomez Almeida was provided with office space, telephone and network access on the Clients' site (admitted)

o. Luis Gomez Almeida did not incur operating expenses in order to provide the services (**denied**)

p. Neither Luis Gomez Almeida nor the appellant bore any financial risk (**denied**)

q. Neither Luis Gomez Almeida nor the appellant was required to make any investment in order to provide the services (**denied**)

r. Luis Gomez Almeida was solely dependant on the income he received with the contracts with the Clients (**denied**)

s. Luis Gomez Almeida did not have more than one client at the same time during the Relevant Period (**admitted**)

t. Luis Gomez Almeida did not solicit any additional business while he was contracted to the Clients (**admitted**)

u. ARQ was not associated with the appellant during the Relevant Period (**admitted**)

v. the appellant deduction $4,983, $3,894 and $3,545 on account of payments for GST/HST remittance for the 2007, 2008 and 2009 taxation years, respectively (**admitted**)

w. the GST/HST remittances were included in the disallowed deduction expenses as set out in paragraph 6 above under the headings "Business, Taxes, licences and membership" and "Withholding taxes" (**admitted**)

x. the appellant used the quick method of accounting to calculate GST/HST remittances (**admitted**)

Appellant's position

[3] The appellant submits that it was not a "personal services business" as per the test in subsection 125(7) of the Act during the relevant period, and, therefore, all expenses and deductions should be allowed as claimed. The appellant relies strongly upon the intention of the parties in this case, as evidenced by the terms and conditions of the contracts entered into between the appellant and AQR Management Services Inc. ("AQR") during the relevant period (Exhibit A-1) (the "Contracts"). The appellant points out that several cases of this Court have focused on the

importance of this consideration since the Federal Court of Appeal's decision in *Royal Winnipeg Ballet v. M.N.R.*, 2006 FCA 87, 2006 D.T.C. 6323 (Eng.) (F.C.A.) ("*Royal Winnipeg Ballet*"). In other words, the appellant submits that the intention of the parties and the entire relationship at hand should be paramount in qualifying the relationship.

Respondent's position

[4] The respondent submits essentially that, on the basis of the test propounded in *Wiebe Door Services Ltd v. M.N.R.*, 87 DTC 5025 ("*Wiebe Door*"), Mr. Almeida would, if it were not for the existence of the appellant, reasonably be regarded as an employee of the Clients, the entities to which the services were provided. In other words, the respondent submits that the appellant has not shown that he was an independent entrepreneur. Finally, the respondent submits that intent is not a relevant consideration in a case involving a "personal services business" determination under subsection 125(7) of the Act.

[5] The appellant has called three witnesses: Mr. Luis Gomez Almeida, Mr. Mario Ma and Mr. Jorge Arrozo.

[6] Mr. Almeida's testimony essentially revealed the following:

a. Mr. Almeida is an "Applications Analyst Programmer" where he built programs for clients involving the inputting and extracting of data;

b. Mr. Almeida's work for the Clients could only be done on the Clients' site. The appellant explained that he had access to the Clients' site 24 hours a day, although he could not sign anyone in;

c. Mr. Almeida had to fill out timesheets for the Clients without which the appellant would not have been paid;

d. Mr. Almeida worked as part of team. There was a team leader who made sure the team collaborated properly. Mr. Almeida had to report to the team leader who evaluated the progress of the work he had done;

e. the appellant was paid on a per diem basis for every 7.5 hours worked by Mr. Almeida and authorized by the Clients. If, on a given day, Mr. Almeida worked more or less than 7.5 hours, the per diem basis was increased or decreased on a pro rata basis. In other words, the

appellant was remunerated on an hourly basis. Mr. Almeida added that neither the appellant nor he ever received bonuses for his work. He also explained that there had been some negotiations as to the per diem rate;

f. there was a workstation provided for Mr. Almeida at the Client's site;

g. the appellant obtained contracts on the basis of Mr. Almeida's knowledge;

h. the only operating expenses the appellant incurred (cell phone, etc) were not operating expenses incurred (or required by the Clients) in relation to the provision of services to the Clients;

i. the only risk of loss to Mr. Almeida and the appellant lay in an eventual insolvency of the Clients or AQR, a very unlikely prospect according to the evidence;

j. neither the appellant nor Mr. Almeida had the right to subcontract the work without the Client's approval.

[7] Mr. Ma's testimony essentially revealed the following:

i. during the relevant period, Mr. Ma was also providing information technology consulting services ("IT services") to CRA, Mr. Ma added that he and Mr. Almeida were working at some point on the same team for the CRA and were essentially providing the same IT services;

ii. the CRA (the appeals division) recognized that Mr. Ma was an independent contractor while he was providing IT services to the CRA. I want to point immediately that Mr. Ma's situation differs significantly from that of Mr. Almeida in that the latter had his own corporation.

Discussion

[8] The relevant sections of the Act read as follows:

(125)7 "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;

248(1) "specified shareholder" of a corporation in a taxation year means a taxpayer who owns, directly or indirectly, at any time in the year, not less than 10% of the issued shares of any class of the capital stock of the corporation or of any other corporation that is related to the corporation and, for the purposes of this definition, [...]

125(7) "active business carried on by a corporation" means any business carried on by the corporation other than a specified investment business or a personal services business and includes an adventure or concern in the nature of trade;

125(1) Small business deduction -- There may be deducted from the tax otherwise payable under this Part for a taxation year by a corporation that was, throughout the taxation year, a Canadian-controlled private, an amount equal to the corporation's small business deduction rate for the taxation year multiplied by the least of

(a) the amount, if any, by which the total of

(i) the total of all amounts each of which is the income of the corporation for the year from an active business carried on in Canada (other than the income of the corporation for the year from a business carried on by it as a member of a partnership), and

(ii) the specified partnership income of the corporation for the year exceeds the total of

(iii) the total of all amounts each of which is a loss of the corporation for the year from an active business carried on in Canada (other than a loss of the

corporation for the year from a business carried on by it as a member of a partnership), and

(iv) the specified partnership loss of the corporation for the year,

(b) the amount, if any, by which the corporation's taxable income for the year exceeds the total of

(i) $^{10}/_{3}$ of the total of the amounts that would be deductible under subsection 126(1) from the tax for the year otherwise payable under this Part by it if those amounts were determined without reference to sections 123.3 and 123.4,

(ii) $^{10}/_{4}$ of the total of the amounts that would be deductible under subsection 126(2) from the tax for the year otherwise payable under this Part by it if those amounts were determined without reference to section 123.4, and

(iii) the amount, if any, of the corporation's taxable income for the year that is not, because of an Act of Parliament, subject to tax under this Part, and

(c) the corporation's business limit for the year.

18.(1) In computing the income of a taxpayer from a business or property no deduction shall be made in respect of

[...]

(*p*) an outlay or expense to the extent that it was made or incurred by a corporation in a taxation year for the purpose of gaining or producing income from a personal services business, other than

(i) the salary, wages or other remuneration paid in the year to an incorporated employee of the corporation,

(ii) the cost to the corporation of any benefit or allowance provided to an incorporated employee in the year,

(iii) any amount expended by the corporation in connection with the selling of property or the negotiating of contracts by the corporation if the amount would have been deductible in computing the income of an incorporated employee for a taxation year from an office or employment if the amount had been expended by the incorporated employee under a contract of employment that required the employee to pay the amount, and

(iv) any amount paid by the corporation in the year as or on account of legal expenses incurred by it in collecting amounts owing to it on account of services rendered

> that would, if the income of the corporation were from a business other than a personal services business, be deductible in computing its income;

[9] Each case where the issue is whether a person is an employee or an independent contractor must be decided according to its own facts. Each of the four components (control ownership of the tools, chance of profit and risk of loss) of the composite test propounded in *Wiebe Door* and *671122 Ontario Ltd. v. Sagaz Industries Canada*, [2001] 2 S.C.R.983 (S.C.C.), must be assigned its appropriate weight according to the circumstances of the case. Moreover, the intention of the parties to the contract has, in recent cases of the Federal Court of Appeal, become a significant factor, whose weight, however, seems to vary from case to case (*Royal Winnipeg Ballet*; *Wolf v. Canada*, [2002] 4 FC 396; *City Water International Inc. v. M.N.R.*, 2006 FCA 350; *National Capital Outaouais Ski Team v. M.N.R.*, 2008 FCA 132).

[10] The appellant invokes strongly the intention of the parties as evidenced by the terms of the Contracts. In the context of a personal services business determination, I agree with Boyle J. and V.A. Miller J. when they decided in *609309 Alberta Ltd. v. Canada*, 2010 TCC 166 and in *1166787 Ontario Ltd. v. Canada*, 2008 TCC 93, 2008 D.T.C 2722 (T.C.C. [General Procedure]) respectively, that they did not view intent as a relevant consideration in a case involving a personal services business determination under subsection 125(7) of the Act. I also note that McArthur J. did not consider the parties' intentions in making his personal services business determination in *758997 Alberta Ltd. v. Canada*, 2004 TCC 755, 2004 D.T.C. 3689 (T.C.C. [General Procedure]), I also note that the Federal Court of Appeal in *Dynamic Industries Ltd. v. Canada*, 2005 FCA 211, 2005 D.T.C. 5293 (F.C.A.) did not consider the intentions of the parties in making its personal services determination.

[11] Turning now to the facts, what factors suggest that, if it was not for the existence of the appellant, Mr. Almeida could reasonably be regarded as a person operating his own business?

[12] The opportunity for profit of the appellant and Mr. Almeida was a limited to $69,33 per hour worked (in the case of the contracts signed on the 11th day of March 2006 and on 1st day of May 2006), to $80,00 per hour worked (in the case of the contract signed on the 1st day of May 2007), and to $68,00 per hour worked (in the case of the contract signed on the 1st day of June 2008). Mr. Almeida did not incur

operating expenses in order to provide the IT services. The only risk of loss to Mr. Almeida and the appellant was getting caught up in a potential insolvency of AQR or of the Clients, a very unlikely prospect according to the evidence.

[13] With respect to the ownership of the tools, the Clients provided all the tools. The evidence reveals that Mr. Almeida was provided with office space, telephone and network access on the Clients' site. No other tools were needed or required by the Clients. I want to point out that Mr. Almeida has not persuaded me that he was required by the Clients to own a cell phone.

[14] The control test is quite relevant in the instant case. Mr. Almeida, under his contract with AQR, was required to work for the Clients on location. Mr. Almeida could not decide to work outside the Client's sites. He had to be present on the Clients' sites, working as part of a team organized by the Clients on specific projects ordered by the Clients. Mr. Almeida did not conduct his activities independently. He was directed to use his professional skills as directed by the project's leader. Mr. Almeida reported to the team's leader who evaluated the progress of the work done. The projects were for a specific period of time and to be completed by Mr. Almeida personally, in a specific period of time, under the direction of the Clients, using their tools and office. And finally, I recall that the appellant was paid an hourly rate for the work performed by Mr. Almeida.

[15] On balance, in view of the *Wiebe Door* factors, I conclude that, if it were not for the existence of the appellant, Mr. Almeida could reasonably be regarded as an employee of the Clients and, consequently, the appellant was "a personal services business" in the relevant period and, as such, the Appellant's claim for small business deduction in calculation of its tax liability for the 2007 and 2008 taxation years was properly disallowed by the Minister.

[16] Having concluded that the appellant was a "personal services business", I am of the opinion that the Minister properly disallowed in the amount of $10,660, $8,341 and $9,613 for the 2007, 2008 and 2009 taxations years, respectively in accordance under paragraph 18(1)(*p*) of the Act.

[17] For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 30th day of April 2013.

"Paul Bédard"

Bédard J.

CITATION:	2013 TCC 135
COURT FILE NO.:	2012-1000(IT)I
STYLE OF CAUSE:	GOMEZ CONSULTING LTD AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Canada
DATE OF HEARING:	April 8, 2013
REASONS FOR JUDGMENT BY:	The Honourable Justice Paul Bédard
DATE OF JUDGMENT:	April 30, 2013
APPEARANCES:	
Agent for the Appellant:	Luis Gomez Almeida
Counsel for the Respondent:	Christopher Kitchen
COUNSEL OF RECORD:	
For the Appellant:	
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