



94-76(CPP)

94-76(CPP)

BETWEEN:

ENTRE :

STRATEGIUM MEDIA INC.,

STRATEGIUM MEDIA INC.,

Appellant,

appelante,

and

et

THE MINISTER OF NATIONAL REVENUE,

LE MINISTRE DU REVENU NATIONAL,

Respondent.

intimé.

Appeal heard together with Appeal number 94-2417(UI) on November 7, 1995, at Toronto, Ontario, by

Appel entendu en même temps que l'appel numéro 94-2417(UI) le 7 novembre 1995 à Toronto (Ontario) par

the Honourable Judge Gordon Teskey

l'honorable juge Gordon Teskey

Appearances

Comparutions

Counsel for the Appellant:
David Hager

Avocat de l'appelante :
M^e David Hager

Counsel for the Respondent:
Carol Shirliff-Hinds

Avocate de l'intimé :
M^e Carol Shirliff-Hinds

JUDGMENT

JUGEMENT

IT IS ORDERED AND ADJUDGED that the appeal be allowed and the assessment vacated in accordance with the attached Transcript of the Reasons for Judgment.

PAR LES PRÉSENTES, IL EST ORDONNÉ l'appel soit accueilli et la cotation soit annulée selon la transcription des motifs de jugement ci-jointe.

Signed at Ottawa, Canada,
this 28th day of November 1995.

Signé à Ottawa, Canada,
ce 28^e jour de novembre 1995.

Original signed by
Gordon Teskey
A signé l'original

IN THE TAX COURT OF CANADA

IN RE: The Unemployment Insurance Act

BETWEEN: 94-2417(UI), 94-76(CPP)
STRATEGIUM MEDIA INC.

Appellant

- and -

THE MINISTER OF NATIONAL REVENUE

Respondent

Held before His Honour Judge G. Teskey of the Tax Court of Canada, in the Tax Court of Canada Courtroom Number 2, 9th Floor, Sun Life Centre, West Tower, Toronto, Ontario, on Tuesday, November 7, 1995.

ORAL REASONS FOR JUDGMENT

(Delivered from the Bench on November 8, 1995)

APPEARANCES:

David Hager, Esq. for the Appellant

Carol Shirtliff-Hinds for the Respondent

Peter McQueen - Registrar

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1 HIS HONOUR: The Appellant appealed
2 assessments for unemployment insurance premiums and
3 Canadian pension plan contributions for a group of workers.
4 Both appeals were heard on common evidence.

5 [The Issue] The sole issue before me is
6 whether these workers were hired pursuant to a contract of
7 service or a contract for service.

8 [The Facts] The Appellant is in the
9 advertising and promotion of products and services in chain
10 stores. The Appellant's business has two different facets,
11 namely promotion of products sold inside the stores, which
12 I will refer to as the coupon business, and the making
13 available of information concerning products not sold in
14 the store and services not available in the store which I
15 categorize as the information business.

16 [The Coupon Business] The Appellant comes
17 up with an idea of how to promote a packaged product sold
18 in a chain store. If the packager agrees and buys the
19 service, the Appellant then solicits from the chain store
20 approval for the specific promotion. When this is
21 obtained, the necessary printing is completed. The
22 printing could be discount coupons for a particular item or
23 a recipe in which a particular item is one of the main
24 ingredients.

25 [The Information Business] The Appellant

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1 maintains information bulletin centres in various retail
2 chain stores. A portion is behind glass and the balance is
3 racks where brochures are placed available to the customers
4 to pick up and take away. A great deal of government
5 information is distributed this way.

6 [The Workers] Potential workers for the job
7 in question applied through word of mouth contact or by
8 answering advertisements in local news papers.

9 [Terms of the Contract] During the hearing
10 the Appellant called as witnesses three workers who all had
11 been with the Appellant for a number of years and are still
12 providing service to the Appellant or its successor. The
13 Respondent called two workers who provided service during
14 the relevant period and neither are providing service now
15 to the Appellant or its successor. There was very little
16 difference in the testimony adduced between these two
17 groups. The two workers who no longer are connected with
18 the Appellant inadvertently could not remember all that was
19 said in their initial interviews. Any conflict in the
20 testimony I resolve in favour of the testimony given by the
21 existing workers.

22 The workers must provide their own motor
23 vehicle and storage space for material that is shipped to
24 them on almost a weekly basis. The storage space required
25 changes from a single car garage to an average size

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1 bedroom. The worker is paid a flat rate for each hour
2 worked and a flat per kilometer rate for each kilometer the
3 vehicle is driven. The Appellant will also pay for small
4 incidental expenses such as parking chits.

5 Each worker invoices the Appellant every
6 other Friday for the hours worked for a two-week period and
7 the kilometers driven for that period. They receive a
8 cheque from the Appellant for the full amount of these
9 invoices without any deductions. The Appellant supplies a
10 small Allen wrench and a small pair of wire cutters to each
11 worker and all supplies such as the coupon holders,
12 coupons, and brochures for the information centre. These
13 supplies are all delivered at the Appellant's expense to
14 the worker's storage area (normally in their home).

15 Each worker has a number of stores assigned
16 to him or her. This number varies from time to time. The
17 worker sets his or her own hours of work. The worker is
18 required to attend each store once a week, preferably at
19 the first part of the week. When the supplies arrive at
20 the worker's storage area, he or she will sort out the
21 supplies and then map out what they have to do.

22 A coupon promotion may be discontinued for
23 one particular product requiring the coupons be removed
24 from those stores. (This requires the wire cutters.) One
25 group of stores such as A & P will have a continuing

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1 promotion for an item and the coupon holders will have to
2 be kept full with additional coupons. Another store such
3 as Zayers may be starting a new promotion and the worker
4 will have to attend, use the old coupon holder in the store
5 or affix a new coupon holder, and place the coupons for the
6 new promotion.

7 While at the store the worker is expected to
8 repair or replace any coupon holders that are damaged or
9 missing. There may also be new material for the
10 information centre to be placed as well as existing
11 material to keep the same well-stocked. At least once
12 every four months the worker is expected to clean the
13 information centre glass windows with Windex.

14 The Appellant does not inspect the work to
15 be performed as long as it is completed according to the
16 instructions and during the week. When the worker applies
17 for the work, each is told that there will be no deductions
18 and no benefits. They are advised of the hourly rate and
19 the per kilometer rate on a take-it-or-leave-it basis. The
20 successful applicant is given a minimum training ranging
21 from two hours to a part of two days.

22 There is really no effective supervision.
23 Store managers or representatives of the packaged goods
24 companies could complain to the Appellant. If the work is
25 not satisfactory, the worker is just not given any more

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1 jobs. The Appellant's managers, on a periodic basis,
2 visiting the stores would check to see if anything is in
3 order. This could be once every six months to once every
4 other year.

5 The Appellant did have six workers that they
6 classified as employees that did the same job, the
7 difference being that they are supplied with company vans
8 and all expenses of the van were borne by the Appellant.
9 These employees were under constant supervision, attended
10 meetings at the offices, and received instructions on a
11 daily basis. If repairs or replacements were needed, it
12 had to be done on that day immediately. The reason for
13 these six employees was that they looked after high profile
14 stores that the Appellant wanted to maintain at a very high
15 standard. These high profile stores were inspected and all
16 items checked and repaired daily so that no one involved
17 with the various promotions would have any valid complaint.

18 Although intention is of little importance
19 in deciding one of these cases, there is no question that
20 both the workers and the Appellant intended that the
21 contracts be for service. What the parties call the
22 contract is of no value and the lack of deductions and
23 fringe benefits only goes to intention of the parties.
24 Obviously the Appellant intended the contracts to be for
25 service as no deductions were made and the workers intended

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1 the same as they would have been insisting upon deductions
2 being made if they felt they were employees.

3 The leading authority on the test to be
4 applied is MacGuigan, J.A.'s decision in the Federal Court
5 of Appeal in *Wiebe Door v. Minister of National Revenue*.
6 This judgment was discussed by the Federal Court of Appeal
7 very shortly thereafter in *Moose Jaw Flying Fins*.

8 When I look at all of the evidence before
9 me, with emphasis on the combined force of the whole scheme
10 of operations, and on applying the four-in-one test of
11 MacGuigan, J.A., in *Wiebe Door*, I have no hesitancy in
12 determining that these workers were employed in contracts
13 for service. The fact that the workers provided their own
14 motor vehicle and their own storage area far outweighs the
15 two insignificant tools the Appellant supplied. The motor
16 vehicle used and the storage used would have a great
17 bearing on the chance of profit and risk of loss. The
18 worker controlled this.

19 Control was almost non-existent and no more
20 than normal in classic control for services such as an
21 electrician installing lights in a supermarket. Obviously
22 the supermarket tells the electrician where the lights are
23 to be installed and the electrician installs them. If they
24 don't work he is fired and the control was no more than in
25 those classic type cases.

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1 In regards to integration, I can only refer
2 to the ultimate decision of *Wiebe Door* where the garage
3 door installers were held to be independent contractors. I
4 can see no difference between those garage door installers
5 and these coupon installers.

6 For these reasons, the appeals are allowed
7 and the assessments are vacated. Thank you.

8 CERTIFIED CORRECT

9 

10 Holly Feltman, C.V.R.