• EMPLOYEE VERSUS INDEPENDENT CONTRACTOR? •

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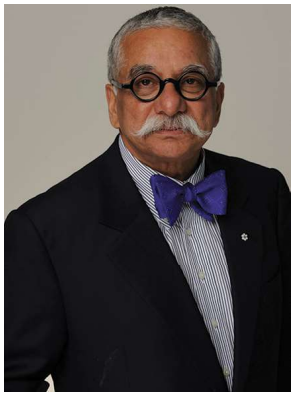

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What is the difference in tax law between Uber drivers and lap dancers? The answer to this simple question, which affects thousands of taxpayers each year, is complex and engages hundreds of individuals in expensive litigation each year. The difference depends upon whether they are considered independent contractors rendering services or employees in service of their employers. Independent contractors can deduct business expenses, unless specifically prohibited. In contrast, employees cannot deduct any expenses at all, unless they are specifically permitted. The distinction between the two sources of income can mean a lot of additional tax payable for employees.

For example, an unemployed person who travels to find employment cannot deduct her expenses. However, an independent contractor in business for himself can claim reasonable travel expenses to solicit business. An employee's legal fees to protect her job or right to earn income is not deductible, but legal fees for wrongful dismissal from employment are deductible. The difference in the tax treatment of independent contractors and employees can mean thousands of dollars of tax on the same amount of net economic income. Disputes lead to prolonged litigation at substantial cost to taxpayers and the judicial system.

However, individuals who prefer independent contractor status for their tax deductions also prefer to be employees for labour law purposes so that they can derive the protection of laws against wrongful dismissal from employment and worker's compensation. These disputes tie up labour tribunals.

The disputes between independent contractor and employee status arise because the distinctions between the two are vague and factually driven in each case. The key elements are the degree of control that the payer has over the individual who provides the services, and the "integration" of the worker's activities in the payer's business. Although the tests are eloquently stated in judicial decisions, Uber drivers and lap dancers are discovering that the facts are subject to subtle nuances, and not that easy to apply in practice.

Control of the worker plays a central role in determining the nature of the relationship between persons who render services and the person to whom the services are rendered. The greater the control that one has over the worker, the higher the probability that the parties have an employment relationship. Thus, each case depends upon the nature of evaluating the worker's performance, participation in profits, assumption of risk and, where applicable, fringe benefits, such as supplementary medical coverage, sick leave, disability provisions.

The CRA will not rule on questions of fact, and disputes are complicated by the legal presumption that the CRA's assumptions of fact in its assessment are presumed correct, unless the taxpayer can prove otherwise. Hence, the taxpayer has the burden in tax litigation of establishing that the CRA is wrong. This 'reverse burden' is not easy for taxpayers, whose understanding of the technical minutia of tax law is limited by the volume and complexity of legislation. Litigation against the CRA, which commands the

resources of hundreds of specialized government litigators armed with technical procedural rules, is time consuming and expensive.

Uber says that it is merely a 'platform' for a mosaic of small independent businesses, rather than an employer of its drivers. The customer uses his or her app to hail a car from an unknown driver, who has a non-exclusive contractual relationship with Uber to provide ride services. The driver provides his own car, but the cost of the service is fixed by Uber. The driver can choose if, and when, he or she wants to work, and for how long. The drivers do not receive any of the traditional employee benefits, which is precisely what they complain about before labour tribunals.

Lap dancers argue the same point. In *Stringfellows Restaurants Ltd. v. Quashie*,[1] for example, the English Court of Appeal held that a table-side dancer was engaging directly with customers, and that the restaurant was merely facilitating her services by administering the payments, and providing a venue for performance. Hence, they would be independent contractors for tax purposes. Uber says there is basically no difference between their drivers and lap dancers. Uber is merely a facilitator through its ride platform, and its drivers are in business for themselves.

Individuals need certainty in tax law and can ill afford the time and costs of extensive litigation. It is time to simplify the tax system and adopt the Carter Commission's recommendation that "a buck is a buck" and treat all sources of income in the same way. Uber drivers, lap dancers, plumbers, doctors, and engineers all deserve to be treated fairly by the tax system. Why? Because it is 2017, the 100-year anniversary of the Canadian income tax and time to write tax law so that taxpayers can understand them.

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1 [2012] EWCA Civ. 1735, [2013] IRLR 99 (C.A.).