

REPORTER

Decision of the Appeal Division

Number: 92-0041
Date: January 6, 1992
Panel: Patrick L. Byrne
Subject: Multiple Classifications

This is an appeal of the June 12, 1991 decision of the director of the Assessment Department to reclassify Company A into the same classification as Company B. The director concluded that the two employers should be regarded as one firm for the purposes of classification and the classification would be 072509 (Steel Frame Erection or Repairs) effective January 1, 1992.

Both employers appeal on an error of fact and a contravention of a published policy of the governors. The issues are whether the firms should be regarded as one firm for the purposes of classification and what the proper classification(s) should be.

Background

Company A was originally registered with the W.C.B. in 1966 as a machine shop for the fabricating of iron. The classification was 070701 (Metal Fabrication Shop or Metal Wholesale Supply, N.E.S.). The 1991 basic rate for this classification was \$3.36 per \$100.00 of assessable payroll. Following an audit by the W.C.B. Assessment Department it was discovered that this firm contracts to both supply and install structural steel and miscellaneous metals. Company A subcontracts to other firms for the erection portion of their contracts.

In January 1990 an associated firm was formed (Company B) with the principals of Company A owning 66⅔% of the new company. This new affiliated company installed the steel that was supplied by Company A. Company B was assigned classification 072509 (Steel Frame Erection or Repairs). The 1991 basic rate for this classification was set at \$18.00 per \$100.00 of assessable payroll.

The manager of Assessment Audits informed the employers on January 16, 1991 that Company A was being reclassified into 072509 at a basic rate of \$18.00 per \$100.00 of assessable payroll on the following basis:

The key factor is that Company A's principal business activity is to enter into supply and install contracts. Where an employer undertakes to both supply – be it by manufacture or purchase – and install the same product, then the installation component is considered to be the predominant business for classification purposes. What this means is that Company A has been incorrectly classified, so the classification will be changed from fabrication to installation. As this means an increase in rates, the change will become effective January 1, 1992.

The director's June 12, 1991 decision letter states, in part:

When viewing Company A and Company B as one, which is done with respect to assigning classifications, it is our understanding that the revenue from installation plus the revenue from the product which is installed by you, Company B or a subcontractor employed by either one of you exceeds 25% of total revenue. You have provided no evidence to dispute this. Your classification is therefore correct.

Law and Policy

Section 42 (Classification of Rates) of the *Workers Compensation Act* provides, in part:

The Board shall establish subclassifications, differentials and proportions in the rates as between the different kinds of employment in the same class as may be considered just; ...

Assessment Policy 30:20:10 (Method of Assigning Classifications) provides in part:

Once a clear understanding of an employer's industrial activity has been reached, the appropriate classification is selected from the *Classification and Rate List*

This manual (policy) does not contain the specific criteria for putting a firm in a particular classification, because of the immense number and detailed nature of the rules. However, these rules, along with copies of the Classification Committee Minutes ... are available When applying these rules to specific situations or firms, individual consideration will be given and variations from the policy will be implemented where the Board's judgment suggests that literal application may be inappropriate or inequitable.

If a firm's operations are an ancillary or extension or add-on phase (i.e. delivery) of other firms, the classification will be the same as the other firms if there is a degree of common ownership. *Even* if the firm is separately registered, the two firms will be regarded as one firm for the purposes of classification. After that is done, the policy of assigning multiple classifications (30:20:20) will be applied. Otherwise, the firm will be assigned the appropriate classification.

Assessment Policy 30:20:20 (Multiple Classifications) provides, in part:

For an operation to be considered a separate industry and classified separately, it must be separate and distinct. To meet this criterion, the following conditions must be satisfied:

1. The operation must be one which is formed by specific personnel as their sole function
2. The product or service must be offered to the public at large with the intent of producing revenue from sales to non-affiliated companies. The operation must not be an incidental, supportive, inescapable or ancillary part of the firm's main industry.
3. Generally, the operation must generate at least 25% of the firm's revenue. (The flexibility afforded by the term "generally" exists to allow discretion in this area. In addition to revenue, consideration will also be given to the operation's ability to stand alone as an independent business and/or physical separation of the operation and/or assessable annual payroll for the specific personnel mentioned in criterion 1 in excess of \$200,000.00. Discretion will be exercised to recognize that an operation of a firm which has a significant presence in a specific industry will be classified the same as its competitors.)

If a firm does not meet the criteria for separate classifications the unassigned operations will be assessed in one classification at one rate. That classification will be the industry classification with the highest assessment rate for the operations undertaken, provided the highest rated category represents at least 25% of the firm's operation. If this is not the case, the next highest classification will be assigned

Evidence and Argument

The facts of this case which are not in dispute are as follows:

1. Company A and Company B are separately registered firms with the W.C.B.
2. The firms have separate physical plants, distinct assessable annual payrolls and separate and distinct labour forces.
3. In 1990 Company A's revenue from the sale of their product was \$4,992,661.00 (82.8%), and the revenue from installation of their product was \$1,036,098.00 (17.2%). The total revenue was \$6,028,759.00.
4. In 1990 Company B's revenue from installation of the product was \$938,610.00. All except \$4,700.00 was from the installation of product supplied by Company A.
5. In 1990 the combined firms' revenue was \$6,967,369.00. Of this amount 71.6% was revenue generated from manufacturing and supplying products, and 28.3% was from installation of the products. The 28.3% installation revenue was generated by Company B (13.5%) and Company A (14.8%).
6. In 1990 the combined firms' revenue was generated by Company B (13.5%) and Company A (86.5%).

The employers provided two basic arguments in support of their appeal. The first is that both firms should be under one classification and the classification should be 070701 (Metal Fabrication Shop or Metal Wholesale and Supply, N.E.S.). They argued that if the two firms do not meet the criteria for multiple classifications then one classification should be used. That classification should be 070701 since the revenue from Company B from installation only generates approximately 15% of the combined firms' revenue.

The employers' second argument is that they do meet the criteria for multiple classifications. That is, the operations are performed by specific personnel as their sole function and their product is offered to the public at large. Further, Company B generates about 15% of the combined revenue and the discretion provided for in Assessment Policy 30:20:20 (part 3) should be exercised in favour of multiple classifications. They argue that either firm could stand alone as an independent business, and both payrolls are in excess of \$200,000.00, and their competitors are afforded multiple classifications.

Reasons and Findings

The director's decision of June 12, 1991 treats Company A and Company B as one firm for the purposes of assigning classifications. He concluded the installation and supply portion of their combined revenue exceeded 25% of total revenue and therefore the one classification should be installation or 072509 at \$18.00 per \$100.00 of assessable payroll for both firms.

The proper method of assigning classifications in this case is to apply Assessment Policy 30:20:10, then to apply Assessment Policy 30:20:20 (if required).

In applying Assessment Policy 30:20:10 the first consideration is the industrial undertakings of the two firms.

There is no dispute that Company B is involved in the erection of steel frames and this represents 100% of their business. Similarly, there is no dispute that Company A is involved in the manufacturing, supplying and erection of steel frames. The disputed aspect is the extent of involvement of Company A in manufacturing and supplying and erection of steel. The evidence shows that, as an individual firm, Company A generated 82.8% of its revenue from manufacturing and supplying and 17.2% from erection. The combined firms generated 71.6% from manufacturing and supplying and 28.3% from erection.

The panel reviewed the "rules and copies of the Classification Committee Minutes" referred to in Assessment Policy 30:20:10. The panel notes there are no rules; there are, however, over 370 decisions of the Committee. The panel did not find these decisions useful in adjudicating this appeal.

The second consideration is whether the two firms should be regarded as one firm for the purposes of classification. This will be done if it is found that the firm's operations are an ancillary or extension or add-on phase (i.e. delivery) of other firms. The *Concise Oxford Dictionary* defines ancillary as, "providing essential support to a central service or industry." The employer's evidence is that the two firms could operate as independent businesses. Further, the evidence shows other firms besides Company B had been contracted by Company A to install their product. The panel finds Company B does not provide an essential support to Company A. Company B does not provide a delivery service for Company A and therefore cannot be an add-on phase. Company B does provide the installation for some of the supply and install contracts undertaken by Company A, and therefore Company B is considered an extension of Company A. The panel finds that under Assessment Policy 30:20:10 Company B and Company A are considered one firm for the purposes of classification and Assessment Policy 30:20:20 is applied.

There are three tests to be met with respect to whether the firms qualify for multiple classifications. The first test is whether the operation is one that is performed by specific personnel as their sole function and whether the labour costs of each operation are accounted for separately. The operation to be considered here is the installation or erection operation. The question is whether the labour costs of the erection or installation of the combined firms are accounted for separately. Revenue is accounted for separately by Company B and Company A. However, Company A also has revenue generated from installation which accounts for 17% of their total revenue. The difficulty in applying this section is that, while Company A generates revenue from installation, there are no labour costs for Company A associated with the revenue. The panel finds that the labour costs of installation associated with Company B are accounted for separately from the fabricating labour costs of Company A, and therefore the first test for multiple classifications is met.

The second test has two parts. The first is whether the product or service is offered to the public at large with the intent of producing revenue. Company A's evidence is that 82.8% of their revenue is from products supplied only to other firms. Company B's revenue for 1990 consisted of \$938,610.00, of which \$4,700.00 was generated from installation for firm(s) other than Company A. The policy states that the service must be offered to the public at large with the intent of producing revenue. While the relative amount is small the panel finds that Company B does offer its service to the public at large. The second part of this test is a determination of whether Company B is an incidental, supportive, inescapable or ancillary part of Company A's main industry.

Incidental is defined in Assessment Policy 30:20:20 as "Where an operation ... exists to service the prime industry of the firm." The example given is, "A machine shop will be classified as such if that is the industry in which the employer is doing business, but a machine shop ... which operates with a boat yard will be considered incidental and supportive to the boat yard operations." The panel finds that the installation service offered by Company B is not incidental or supportive of Company A's fabricating operations. Further, Company B's operation is not considered inescapable as Company B does offer its service to other firms and Company A does sell product to non-affiliated firms. The question of whether Company B is ancillary to Company A has been dealt with previously in this decision.

The panel finds that the second test (both parts) with respect to multiple classification has been met.

The third test is whether Company B generates 25% of the combined firms' revenue. Company B generated 13.5% of the combined firms' revenue. The policy, however, allows discretion in this area. Considering that Company B could operate as an independent business, has a separate physical plant and an annual payroll in excess of \$200,000, the panel finds that the third test for multiple classifications has been met.

The policy also allows multiple classifications where an operation is a significant presence in a specific industry in order to ensure they are classified the same as their competitors. The employer requested a review of the classifications of their competitors, and it is unclear from the file that this was done.

The panel finds that the employers meet the tests for multiple classifications.

Conclusion

There was a contravention of a published policy of the governors. The employers meet the criteria for multiple classifications.

Based on the 1990 data, Company A is properly classified as 070701 and Company B is properly classified as 072509.

The panel points out that this decision is based on the 1990 data. As the business of the two firms and their relationship may change over time the two employers may be reaudited and the proper policies applied.

THE APPEAL IS ALLOWED.

Editors' note: This decision has been edited for publication.

