Aniger Consulting Inc. v. The Queen

Court (s) Database: Tax Court of Canada Judgments
Date: 2010-12-15
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File numbers: 2007-4187(IT)G
Judges and Taxing Officers: Leslie M. Little
Subjects: Income Tax Act

Docket: 2007-4187(IT)G

BETWEEN:

ANIGER CONSULTING INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of *Sael Inspection Ltd.* (2007-4188(IT)G) and *Barry Singleton* (2007-4189(IT)G)
on May 19 and 20, 2010, at Calgary, Alberta

Before: The Honourable Justice L.M. Little

Appearances:

Counsel for the Appellant:	Patrick Lindsay Colena Der
Counsel for the Respondent:	Cynthia Isenor

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 2001 and 2002 taxation years are allowed, without costs, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this 15th day of December 2010.

"L.M. Little"

Little J.

Citation: 2010 TCC 637
Date: December 15, 2010
Docket: 2007-4187(IT)G

BETWEEN:

ANIGER CONSULTING INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Little J.

A. FACTS

[1] The Appellant was incorporated under the laws of the Province of Alberta on November 27, 1996.

[2] Regina Gajecki ("Regina") purchased 100 per cent of the shares of the Appellant on February 1, 2000.

[3] Regina is the sole shareholder and Director of the Appellant.

[4] In the years under appeal, Regina was employed on a full-time basis by Atco Gas Ltd. as a Clerk C.

[5] In the years under appeal, Regina was the common-law spouse of Barry Singleton ("Barry"). Regina is now the wife of Barry.

[6] SAEL Inspection Ltd. ("SAEL") was incorporated under the laws of the Province of Alberta on March 29, 1982.

[7] Barry was the sole shareholder and President of SAEL during the years under appeal.

[8] In 1999, Barry, his brother Bryan Singleton ("Bryan") and their respective companies entered into a contract to provide the engineering services to assist in the construction of the Alliance Pipeline Project (the "Project").

[9] The Project was a proposed pipeline to carry natural gas from Fort St. John, British Columbia to Chicago, Illinois. The proposed pipeline was to go across a portion of the Province of British Columbia, through the Province of Alberta and through a portion of the Province of Saskatchewan. The proposed pipeline was to cross into the United States near Estevan, Saskatchewan.

[10] The cost of the Project was estimated to be $5 Billion. The Canadian portion of the Project was estimated to be $1.8 Billion.

[11] The Project was completed under budget.

[12] The Appellant entered into a consulting agreement with SAEL (the "Agreement") on March 20, 2000.

[13] The Agreement provided that the Appellant would provide various services to SAEL.

[14] Regina was the only employee of the Appellant.

[15] Regina maintains that she provided all of the services to SAEL for the Appellant.

[16] The Minister of National Revenue (the "Minister") maintains that the Appellant and SAEL are not associated corporations within the meaning of the *Income Tax Act* (the "Act").

[17] Regina earned employment income of $47,690.70 from Atco Gas Ltd. in 2001 and she earned employment income of $30,000 from the Appellant in 2001.

[18] 100 per cent of the income of the Appellant in the years under appeal was derived from the consulting services that were provided by the Appellant to SAEL.

[19] The Appellant invoiced SAEL for the consulting services on the following basis:

Period	Amount	GST	Total
Dec. 1, 1999 – Nov. 30, 2000	$260,000.00	$18,200.00	$278,200.00
April 1, 2000 – March 31, 2001	$275,000.00	$19,250.00	$294,250.00
April 1, 2001 – March 31, 2002	$280,000.00	$19,600.00	$299,600.00

[20] The Appellant was paid by SAEL for the consulting services.

[21] SAEL also paid bonuses to the Appellant of $95,000.00 in 2001 and $100,000.00 in 2002.

[22] Pursuant to the Agreement, the Appellant was to be paid $15,000 per month by SAEL.

[23] SAEL paid the Appellant on an annual basis.

[24] The Appellant had no additional clients during the years under appeal.

[25] The Appellant did not own any fixed assets, such as a computer, or any office equipment that would be used by the Appellant to complete the work performed for SAEL.

[26] In reviewing the tax status of the Appellant, the Minister has concluded that, but for the existence of the Appellant, Regina would have been regarded as an employee of SAEL.

[27] The Minister has also concluded that the consulting services provided to SAEL by the Appellant were the personal services of Regina.

[28] The Minister maintains that the Appellant was not entitled to claim the small business deduction in the years under appeal.

[29] In the 2001 and 2002 taxation years, the Appellant claimed a number of business expenses.

[30] The Minister denied the business expenses claimed by the Appellant.

B. ISSUES

[31] The issues are whether:

a) The Appellant was operating a personal services business in the 2001 and 2002 taxation years;

b) The Minister properly denied the Appellant the small business deduction for the 2001 and 2002 taxation years; and

c) The Minister properly disallowed expenses in the amount of $6,000.00 and $10,516.00 for the 2001 and 2002 taxation years respectively.

C. ANALYSIS

[32] During the hearing, the following points were also established:

1. The 2002 bonus paid to the Appellant by SAEL was accrued in full on the books of SAEL as at March 29, 2002. As a result of this arrangement, the Appellant was paid eight months in advance of the completion of the term of the Agreement.

2. According to the calculation of the Canada Revenue Agency ("CRA") auditor, the average hourly wage paid to the Appellant by SAEL (including monthly salary and yearly bonuses) was $167.00 per hour for the 2001 year and $179.00 per hour for the 2002 year.

3. 100 per cent of the Appellant's income in the years under appeal was derived from the consulting services performed by the Appellant for SAEL.

4. Regina's average hourly wage for her full-time employment at Atco Gas Ltd. for 2002 was $25.00 per hour.

5. SAEL hired various individuals to provide drafting and other professional services on the Project.

6. The other parties that SAEL contracted with on the Project were paid between $20.00 to $35.00 per hour for their services on the Project.

7. The other parties SAEL contracted with on the Project were required to provide monthly invoices, including the hours worked on a daily basis and details relating to the services that were provided.

8. The invoices that the Appellant provided to SAEL were provided on an annual basis with little or no detail on the hours worked, nor on the services provided to SAEL for the Project.

[33] In the Reply to the Notice of Appeal, at paragraph 18, the Minister states:

18gg) Aniger did not perform the Consulting Services for SAEL as claimed, as other individuals were contracted to do this work.

[34] In the Reply to the Notice of Appeal filed by the Minister for SAEL, at paragraph 18, the Minister said:

> 18hh) Alternatively, if Aniger did perform the Consulting Services for SAEL as claimed, then the amounts paid to Aniger were grossly inflated given her qualifications, the type of services performed, and the amounts paid to other contractors providing higher level services on the project.

CONCLUSION

[35] After considering the various points as outlined above, I have concluded as follows:

1. The Appellant was operating a personal services business in the 2001 and 2002 taxation years. It therefore follows that the Appellant is not entitled to claim the small business deduction for those years;

2. The test to determine whether a company is a personal services business is found in subsection 125(7) of the *Act*. The question that must be asked, for the purpose of this section, is:

> …whether the incorporated employee [Regina] would reasonably be regarded as an officer or employee of [SAEL] … but for the existence of the Corporation [i.e. the Appellant]…

[36] In reaching the conclusion that the Appellant's business was a personal services business, I have noted the following facts:

(a) The close relationship between Barry and Regina, i.e., she was a common-law spouse during the years under appeal and she is now married to Barry. (Note: Barry owned 100 per cent of the shares of SAEL and Regina owned 100 per cent of the shares of the Appellant);

(b) The fact that Regina was working on a full-time basis at Atco Gas during the day and she claims that she was working for the Appellant at night and on the weekend. There is a credibility question on this point;

(c) The fact that Regina received $25.00 an hour at Atco Gas and $167.00 an hour from Aniger. In other words, is it reasonable to think that a person can work enough hours in their spare time and receive an amount for their spare time work that is five times the amount that they received in their regular full-time job? There is a credibility question on this point;

(d) It was also noted that other people who were doing the same type of work that Regina claims to have done for Aniger on the Project were being paid $25.00 to $30.00 per hour;

(e) The Appellant was billing SAEL on an annual basis. The Appellant did not have to provide an invoice in a timely manner;

(f) The Appellant did not require any capital assets or have any financial requirements in order to provide the services to SAEL; and

(g) The Appellant did not employ more than five full-time employees. Regina was the only employee of the Appellant.

[37] I have reviewed various legal authorities dealing with a personal services business. In my opinion, the decision of the Federal Court of Appeal in *Dynamic Industries Ltd. v. The Queen*, 2005 D.T.C. 5293, is applicable in this case. At paragraph 41, the Court said,

> … the interposition of a corporation between the recipient of a service and the individual who personally performs the service could result in an unreasonable tax advantage resulting in part from a lower corporate tax rate that is significantly lower than the personal tax rate and in part from opportunities for income tax splitting. …

[38] The wording contained in subsection 125(7) of the *Act* basically requires a Court to ignore the actual relationship of the parties and determine what the parties would have done had they set up a different relationship. I have, therefore, concluded that Regina would reasonably be regarded to be an employee of SAEL.

[39] I also refer to the following Court decisions in support of my conclusion that the Appellant's business was a personal services business:

(a) *609309 Alberta Ltd. v. The Queen*, 2010 D.T.C. 1136; and
(b) *1166787 Ontario Ltd. v. The Queen*, 2008 D.T.C. 2722.

[40] In the Reply, the Minister maintained that the Appellant did not perform the consulting services for SAEL (see paragraph [33] above). I disagree. I have concluded that the Appellant did perform work for SAEL as outlined in the Agreement.

Expenses

[41] The following expenses are involved:

	2001	2002
Accounting and Legal Expenses	$2,049.00	$2,682.00
Automobile expenses	$3,600.00	$3,600.00
Premises Costs	$2,400.00	$2,400.00
Portfolio Management Fee	-	$1,834.00

[42] In *Dynamic*, the Court noted that otherwise deductible business expenses are not deductible at the corporate level as a result of the restrictions contained in paragraph 18(1)(*p*) of the *Act*.

[43] Based on the wording contained in paragraph 18(1)(*p*) of the *Act*, I have concluded that the Appellant is not allowed to deduct the expenses outlined in paragraph [41] above.

[44] It should be noted that when the Minister reassessed Barry for the 2002 taxation year, he included as a benefit the amount paid by SAEL to the Appellant for consulting services provided by the Appellant. (Note: This amount was also included by the Minister in the Appellant's income.)

[45] However, during the hearing, Counsel for the Respondent indicated that the Reassessment against Barry would be reduced to eliminate the imposition of benefits under subsection 56(2) of the *Act* in the income of Barry. Counsel for the Respondent provided the Court with a letter dated May 11, 2010 which reads, in part, as follows:

> … the Respondent is formally conceding the imposition of 56(2) benefits on Mr. Singleton regarding the unreasonable portion of the fees paid to Aniger.

Costs

[46] Counsel for the Appellant argued that solicitor/client costs should be awarded in this situation.

[47] In *Young v. Young*, [1993] 4 S.C.R. 3, the Supreme Court of Canada said:

> Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. …

[48] A large number of Court decisions have made similar comments. In my opinion, this is not a case where solicitor/client costs should be awarded.

[49] With respect to party to party costs, I have concluded that, since success has been divided, no costs should be allowed.

[50] The appeal is allowed, without costs, and the Minister is to make the adjustments as outlined above.

Signed at Vancouver, British Columbia, this 15th day of December 2010.

"L.M. Little"

Little J.

CITATION: 2010 TCC 637

COURT FILE NO.: 2007-4187(IT)G

STYLE OF CAUSE:	ANIGER CONSULTING INC. AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	May 19 and 20, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice L.M. Little
DATE OF JUDGMENT:	December 15, 2010

APPEARANCES:

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Counsel for the Respondent:	Cynthia Isenor

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