[OFFICIAL ENGLISH TRANSLATION]

Date: 20030117
Docket: 2000-2504(IT)G

BETWEEN:

LISE GAGNÉ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 25, 2002, at Chicoutimi, Quebec

Before: The Honourable Judge Alain Tardif

Appearances:

Counsel for the Appellant: Yves Laperrière

Counsel for the Respondent: Anne-Marie Boutin

JUDGMENT

The appeal from the assessments made under the *Income Tax Act* for the 1997 and 1998 taxation years is allowed, without costs, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the appellant paid third parties the amount of $300 a week, that is, $15,600 a year, for each of the taxation years, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 17th day of January 2003.

"Alain Tardif"

J.T.C.C.

Translation certified true
on this 10th day of March 2004.

Sophie Debbané, Revisor

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LISE GAGNÉ,

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REASONS FOR JUDGMENT

Tardif, J.T.C.C.

[1] This is an appeal concerning the 1997 and 1998 taxation years.

[2] The points at issue are as follows:

- Did the appellant operate a business with a view to making a profit?
- If so, was the Minister of National Revenue (the "Minister") correct in disallowing certain expenses, including and in particular a portion of the amounts paid to various employees as salary?

Facts

[3] In 1997 and 1998, the appellant reported no business income since, she said, her reported income was regular employee remuneration.

[4] During and after that period, the appellant offered care and accommodation services to intellectually disabled persons.

[5] The six beneficiaries of her services were housed in a residence that she rented from a non-profit corporation whose corporate name was "Loge réadaptation Sag-Lac inc.".

[6] It was a residence where each beneficiary had his or her room; there the beneficiaries were fed and cared for in accordance with their degree of dependence.

[7] The services offered and dispensed were provided by the appellant and a few persons whom she had hired to do so; the particular care requiring an expertise was provided by resource persons from the outside without any financial contribution from the appellant.

[8] The appellant did not reside in the same place and had her private residence elsewhere; she travelled every day to the residence, which housed the six beneficiaries, where she spent approximately 40 hours a week.

[9] In consideration for her responsibilities, which were to house, feed and see to the welfare, comfort and safety of the six beneficiaries, the appellant received two classes of income: she received most of the social assistance benefits that the beneficiaries received from the provincial income security program and a per diem for each beneficiary from the Centre de réadaptation du Québec through the Régie régionale de la santé.

[10] The appellant paid all the expenses relating to the beneficiaries' occupation of the premises such as rent, beneficiary allowances, indoor and outdoor maintenance of the premises, meals, transportation, telephone and utilities.

[11] The appellant took a salary of $15,300 for the 1997 taxation year and a salary of $17,460 for 1998; that salary was taken out of the income deposited to a special account to which only she and her father, an accountant, had access.

[12] All the expenses were paid in cash, without receipts; in the same manner, she also paid a very large component of the operating costs—$25,785 for 1997 and $25,335 for 1998—as remuneration to persons whose services she retained during periods when she was not present.

[13] The appellant received total income of $94,018.11 for 1997 and $93,769.10 for 1998 in the context of the activities described above.

[14] At the time of the audit, although they were not very convincingly substantiated, the Minister allowed the following expenses (Exhibit I-2):

SUMMARY OF CHANGES

Computation of the income of Maison d'hébergement des Cyprès

Year	**1998**	**1997**
INCOME		
Income from the Centre de réadaptation	$43,405.10	$44,548.11
Income from beneficiaries	50,364.00	49,470.00
	$93,769.10	**$94,018.11**
EXPENSES		
Land maintenance	1,154.00	1,200.00
Allowance to beneficiaries	10,656.00	10,440.00
Housing	26,980.00	23,520.00
Telephone and utilities	745.62	669.51
Food and cleaning	18,720.00	18,720.00
Vehicle expenses and travel	1,500.00	1,125.00
Salaries	5,000.00	5,000.00
Miscellaneous expenses	1,315.35	1,634.34
	$66,070.97	**$62,308.85**
TOTAL:	**$27,698.13**	**$31,709.26**

. . .

[15] Although there was no supporting documentation, the Minister in fact allowed all the expenses, with the exception of those under the salary item, for which he allowed an amount of $5,000 for each taxation year.

[16] The evidence also showed that the appellant alone controlled the budget. All the expenses except rent were variable, and the appellant had complete freedom as to how she delivered the services she had agreed to render to the beneficiaries. She moreover admitted that any surplus generated belonged to her by right.

[17] The appellant first contended that she had not operated a business within the meaning of the *Income Tax Act* (the "*Act*"); she said that she had no chance of making a profit since she had no control over the income, which was fixed.

[18] She also stated that she had no flexibility as to the number of beneficiaries established by outside interveners. Lastly, she contended that the figures in her homemade balance sheets showed that it was impossible to obtain income greater than the salary she took. In her opinion, she had no chance of profit—only risk of loss.

[19] Operating a business for the purpose of making a profit does not in any way require one to have full control over all the components of income. One need only know the income available and have broad flexibility with regard to expenses so as to manage as carefully as possible in order to generate surpluses of which one is the sole beneficiary.

[20] In support of her claims that she had not operated a business, the appellant also claimed that she had carried on a regulated activity excluded from the commercial sector by the legislature.

[21] I do not believe that the appellant qualified for the legal exclusion. She did not house the persons for whom she was responsible at her home, in her private residence; she had rented a house for the sole purpose of providing for the welfare, comfort and safety of the residents entrusted to her on the basis of the premises.

[22] The appellant travelled each day to the residence the sole purpose of which was to provide for the care of the disabled persons entrusted to her; she saw to the proper conduct of operations; she spent approximately 40 hours a week there. She spent the rest of the time hiring various persons, including students, to provide a presence and to ensure that the beneficiaries could have access to a resource if required.

[23] The assessment was made in the context of an investigation of a number of operators of residences for persons suffering from severe mental or physical disabilities.

[24] Given the grey area surrounding the exemption status conferred by the legislature on certain residences established as reception centres for persons who, as a result of a disability, have a high degree of dependence, the auditor clearly took a sympathetic approach to the appellant's case.

[25] He allowed all expenses without receipts or supporting documentation on the sole basis of the appellant's oral statements and particulars, with the exception however of those under the salary item, where once again the auditor allowed an amount of $5,000 without any supporting documents.

[26] The appellant filed utterly deficient and indeed baffling accounting, requiring an absolute act of faith in view of the fact that everything had been paid for in cash, without vouchers, or even any notation of any kind whatsoever.

[27] That way of doing things was all the more surprising since the appellant admitted that her father, an accountant by training, had handled the administration and accounting.

[28] As to the salary heading, under which an amount of $5,000 had been granted for each of the years, the appellant was unable to name the persons who had been paid in cash; she filed no evidence regarding the work performed, timetables, schedules, rates and so on. She essentially stated that, for each year in issue, she had paid over $25,000 in cash to unidentified persons. She would like the Court to allow deductions of $25,785 for 1997 and $25,335 for 1998 solely on the strength of her testimony, on the assumption that it would conclude that she had operated a business.

[29] The appellant sought and accepted responsibility for taking care of six persons suffering from severe mental impairment, at a place other than her private residence, in exchange for income from two sources: the social assistance that the residents received and a per diem. While that choice was not debatable in any way, the consequence was that she and the members of her family could not ensure the comfort, welfare and safety of the beneficiaries by their presence alone. In other words, her choice resulted in higher service delivery costs because all her absences had to be offset by the presence of third parties.

[30] To do so, she contended that she had relied on a number of persons, including students, who obviously had to be remunerated. All were paid under the table, in cash, with the blessing of her accountant father, who prepared the envelopes without any information on the workers in question.

[31] The appellant devoting some 40 hours to the residents, other persons clearly had to be put to work to ensure a constant presence.

[32] The residence for which the appellant was responsible housed six mentally impaired persons. During the day, there appears to have been people coming and going in such a way as to meet the users' needs. There had to be an attendant at night and during certain periods. How many hours? At what hourly rate? What duties had to be performed? All those questions remained unanswered, except that the appellant made a simple calculation to determine that one week represented 168 hours, that she was working approximately 40 hours, and thus the house was left unsupervised for approximately 120 hours.

[33] The respondent allowed an amount of $5,000; the appellant contends that she paid $25,785 in 1997 and $25,335 in 1998.

[34] This was not a secondary or marginal component, but rather an amount greater than $50,000 for two years, paid in cash to unidentified persons. Accepting as the only evidence the testimony of an interested person without supporting documentation would be tantamount to endorsing utterly unjustified behaviour and reckless disregard.

[35] I understand that the appellant might have paid more than $5,000 a year, but I do not believe she disbursed the amount claimed as an expense under that item. I therefore set that amount, arbitrarily, I agree, but failing supporting documentation, I have no other means of valuing it other than at $300 a week, or $15,600 a year, for each of the taxation years.

[36] In support of her claims, the appellant referred to a very interesting decision in *Centre du Florès c. St-Arnaud*, C.S. Montréal 500-05-066368-018, 2002-03-04, AZ-50115188, D.T.E. 2002T-309.

[37] In that case, Viau J. was asked to review the decision of St-Arnaud J., who had reversed a decision by the Labour Commissioner, Jean Lalonde. Viau J. dismissed the application for judicial review and affirmed St-Arnaud J.'s decision.

[38] It is easy to see from that decision that many initiatives have been put forward over the years to deinstitutionalize the health system in order to enable those suffering from physical and mental disabilities to gain access to resources that are more humane, more family-like, more reliable and especially unanimously recognized as more advantageous for beneficiaries.

[39] The idea has been to make use of foster families, which integrate beneficiaries requiring special attention into family life. The private residences of foster families provide an exceptional environment.

[40] In the circumstances, relations between foster families and beneficiaries are shaped by family spirit, dedication and more humanitarian than monetary concerns.

[41] It is possible of course to track or account for some services, but that is not true of human aspects, which are not quantifiable. It was therefore appropriate and entirely legitimate for the legislature to recognize these new realities, which are beneficial for many disadvantaged persons.

[42] Since demand has exceeded supply, some conceived of and established other types of reception centres where human and family-like supervision have considerably declined. I do not believe that that type of residence is covered by the exemptions provided for in sections 312 and 313 of the *Act respecting health and social services*, which read as follows:

> 312. One or two persons receiving in their home a maximum of nine children in difficulty entrusted to them by a public institution in order to respond to their needs and afford them living conditions fostering a parent-child relationship in a family-like environment may be recognized as a foster family.
>
> One or two persons receiving in their home a maximum of nine adults or elderly persons entrusted to them by a public institution in order to respond to their needs and afford them living conditions as close to a natural environment as possible may be recognized as a foster home.
>
> 313. Activities and services provided by a family-type resource are deemed not to be a commercial enterprise or a means to make profit.
>
> (My emphasis.)

[43] I also think it useful to cite a passage from the judgment of Viau J. in which no emphasis was made:

[TRANSLATION]

> . . . the performance of the required work, in accordance with article 3 of the contract, to "reside and share his existence with the user" does not imply in any way that the contract worker can escape that requirement without failing to comply with his contract. He may of course have himself replaced from time to time, but the nature of the contract remains "*intuitu personae*". The Framework for Recognition of Intermediate Resources (E-9) imposes on every contract applicant, subject to selection by interview, the requirement of strict criteria, including the following enumeration of required personal qualities: degree of maturity; empathy; self-esteem; quality of judgment; ability to have satisfactory relations with others; degree of openness to the outside world; sexual maturity; and so on. If the personal obligation to perform the work did not exist, it would be hard to see the purpose of such criteria. According to the testimony of educator DAGENAIS, the duty to warn the educator in case of replacement during vacation still exists. Mr. Dagenais added that, if the user falls into confusion, the contract employee can at all times communicate with an educator to obtain assistance. An emergency number is available on weekends. Thus, this legal relationship of subordination, which must be interpreted liberally and may even be minimal, nevertheless exists, even though it may not be exercised on a daily basis and may allow considerable flexibility in the performance of duties, particularly in the administration of a user's personal expenses.

(My emphasis.)

[44] In the instant case, if the contract binding the appellant and the payers of the per diem was a contract "*intuitu personae*", that was not apparent at all from the evidence. The appellant essentially described her work as any work to which she devoted approximately 40 hours a week. It was essentially a business operated at a place other than her private residence.

[45] For all the aforementioned reasons, there is no doubt that the appellant did in fact operate a business during the years in issue. As a result, she was entitled to deduct all the expenses relating to the operation of the business, provided they were necessary and supported by the appropriate documents. Since the third party remuneration component was the only point at issue, the Court, having regard to the very deficient evidence, determines that the amount of that expense was $15,600 for each of the years in issue.

[46] The appeal is therefore allowed on the basis that for the 1995 and 1996 taxation years the appellant was entitled to deduct from her business income an amount of $15,600 for remuneration paid to third parties, the whole without costs in view of the fact that the case essentially arises from the absence of adequate accounting. I am convinced that, if the appellant had been able to file a minimum of supporting documents, the case would have been settled to her satisfaction without her having to institute an appeal.

[47] As to costs, it seemed clear to me that, with an elementary level of bookkeeping supported by a minimum of supporting documents, the case would not have been the subject of an appeal and would clearly have been settled to the appellant's satisfaction. In other words, the appellant was the cause of her own problem, as a result of which I allow the appeal in part, but without costs.

Signed at Ottawa, Canada, this 17th day of January 2003.

"Alain Tardif"

J.T.C.C.

Translation certified true
on this 10th day of March 2004.

Sophie Debbané, Revisor