Citation: 2008 TCC 620
Date: 20081124
Docket: 2007-656(IT)I

BETWEEN:

GARY K. O'HARA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

For the Appellant: The Appellant himself
Counsel for the Respondent: Devon Peavoy

REASONS FOR JUDGMENT

**(Delivered orally from the bench
on September 26, 2007, at Halifax, Nova Scotia.)**

McArthur J.

[1] These are appeals from reassessments by the Minister of National Revenue for the Appellant's taxation years 1999 through 2004 inclusive. The issue is whether the Appellant was an employee of the Carlow Group of companies. The facts relied on by the Minister in paragraph 12 of the Reply to the Notice of Appeal are accurate, but the first six have very little effect in determining the issue in these appeals. Those facts are:

(a) during the years under appeal, the Appellant was the sole shareholder of 3022327 Nova Scotia Limited (3022327);

(b) 3022327 operates under the business names “Watchdog Communications”, “Watchdog Security” and “Auto King Sales”;

(c) 3022327 is involved in the sales and service of computers;

(d) 3022327 had no employees during the years under appeal;

(e) during the years under appeal, 3022327 performed services for one or more of Pajeck Management Limited, Bromwick Holdings Limited, ADCO Holdings, Alder Communications Limited or 2034405 Nova Scotia Ltd. (collectively referred to as the "Carlow Group");

(f) the Appellant did not have a contract with the Carlow Group to perform services;

(g) the Appellant's brother, Gerald O'Hara, was the majority shareholder of the corporations comprising the Carlow Group;

(h) during the years under appeal, the Appellant was paid by the Carlow Group in the amount of $500 per week;

(i) there were no deductions taken from the Appellant's pay received from the Carlow Group;

(j) the Appellant worked 44 weeks in 1999 and 52 weeks in each of 2000, 2001, 2002, 2003 and 2004;

(k) the Appellant's gross and net incomes were not less than the amounts described in the income contained in paragraph 11.above;

(l) during the years under appeal, none of the Carlow Group of Companies deducted or remitted EI premiums, CPP contributions or income tax at source on behalf of the Appellant; and

(m) during the years under the appeal, the Appellant did not receive T4 statements or any other statement with respect to earnings, including pay stubs, from the Carlow Group.

While I have said that these assumptions are accurate, the Appellant states that subparagraph (k) is incorrect.

[2] To summarize, the facts as I find them from the evidence include that from at least 1991 to 1994, the Appellant was employed as a service manager for Suzuki Motors. In 1994, his brother Gerald hired him as a sales manager for the Carlow Group at the same annual salary of approximately $39,000 that he was receiving from Suzuki. I have no doubt that Gerald was the boss and the business belonged to

Gerald. This was confirmed by three witnesses, two of whom worked for the Carlow Group during some of the years in question, and one of whom was the Appellant's son Jordan. The third witness was a close personal friend of the Appellant with whom the Appellant shared his working situation from time to time over the years.

[3] Gerald and his companies and various entities had the control and they owned all the equipment, including the offices and tools necessary to monitor and maintain security installations. There was no contradictory evidence to the statement of the Appellant to the effect that he was paid $500 per week throughout the period, but for a deviation in 1999.

[4] It remains a mystery why after receiving pay cheques with stubs setting out a breakdown, including gross salary, usual deductions and net pay in 1999, thereafter, the Appellant received simply a cheque of $500 weekly from different Carlow Group entities with no breakdown and no annual T4s. This leaves me somewhat skeptical, yet there was no explanation other than that of the Appellant that Gerald appears to have been mysterious in his business affairs. The Appellant explained that Gerald was going through financial difficulties and repeatedly promised to regularize the Appellant's situation, but never did.

[5] In 2000, Carlow Group and Gerald were vigorously audited by Canada Revenue Agency. The Appellant called it "raided" because there were approximately 13 members of the audit team in attendance along with the RCMP. The Carlow Group and Gerald were charged under criminal legislation I believe, for non-remittance of employee deductions. The corporation pled guilty and was fined, and the charges against Gerald were dropped.

[6] At some point in early 2000, Gerald had serious heart problems. The Appellant remained at the Carlow Group, despite not receiving T4s and being at a loss to file income tax returns, which he finally did file in a late manner. He believed the $500 weekly was net of EI premiums, CPP contributions and income tax deductions. Although with some reservations, I accept his evidence in this regard.

[7] During the most difficult financial period for the Carlow Group , a major supplier of security equipment ceased its dealings with the companies, and I presume Carlow Group was in serious debt. At times, Gerald sent employees home because there was no equipment to install. To alleviate the problem, the Appellant, through his company 3022327, purchased products immediately necessary, on a cash basis, after assuring himself that the Carlow Group would reimburse his company without delay. Obviously, this is not the usual act of an employee, yet I accept the Appellant's

explanation. Gerald was in a very difficult situation, with serious financial problems, with the forces of CRA investigating his companies and his financial maneuvering. Through all this, and not surprisingly, he had health problems.

[8] The Appellant was in a managerial position and he felt the responsibility to keep the Carlow Group operating and the employees working. I do not believe his company's financial advances were more than $2,000 at any one time. I accept this as an act of a responsible employee taking into consideration his brother's dire straits and the need to keep the employees working, including his son Jordan.

[9] The decision of the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*[1] places emphasis on the question and subsequent answer to "whose business was it". Going back to subparagraphs 12(a) to (f) in the Reply, the Minister emphasizes that the Appellant had his own corporation 3022327, operating under the names Watchdog Communications, Watchdog Security and Auto King Sales. Although the name Watchdog relates more to the Carlow Group type of activities, the Minister accepts that 3022327 "is involved in the sales and service of computers".

[10] I accept the Appellant's evidence that 3022327 did very little work for the Carlow Group and he referred to the fact that only one invoice was found and filed in evidence, [2] which was to Alder Communications for three hours of work at $15 per hour. I find the operation of 3022327 was insignificant, when considered to the overall situation. I have no doubt that considering all the facts, the Appellant was an employee of the Carlow Group. It is unfortunate that Gerald or his daughter did not testify. Gerald's daughter worked in a senior managerial position for the Carlow Group, yet I know of no adverse inference, excepting that Gerald would have been quite hostile.

[11] I will review again the criteria set out in *Wiebe Door Services Ltd. v. M.N.R.*[3] and *Sagaz*. Under control, Gerald as owner of the Carlow Group had final control of the Appellant. The only evidence we had in this regard was that of the Appellant, supported by two former employees and a personal friend. They all testified that the Appellant was an employee and not an independent contractor. Also,

---

1 [2001] 4 C.T.C. 139 (S.C.C.).

2 Exhibit A-9.

3 87 DTC 5025 (F.C.A.).

overwhelmingly, the tools used by the Appellant such as office building, supplies and all that was necessary to install security systems, were owned and controlled by the Carlow Group.

[12] With respect to profit and loss, the Appellant had a fixed salary and did not share in profits or losses of the Carlow Group. This is dramatically supported by the fact that during the intense investigations of the Carlow Group by CRA, the Appellant was not brought into the investigations, which would have been expected if there was even a hint that he was something more than an employee. But the Appellant had no shares in the Carlow Group.

[13] While it is unusual that no deductions were made for EI premiums , CPP contributions and income tax, the Carlow Group and Gerald were mysterious and surreptitiously operating through many names, paying all employees through a variety of bank accounts and not remitting deductions to the Minister. No wonder they were audited vigorously. I have no doubt that the Carlow Group was not the Appellant's business and the indicia referred to earlier heavily supports the Appellant's position that he was an employee.

[14] Where does that leave us? Counsel for the Minister fairly concludes that if the Appellant is found to be an employee, he is entitled to claim tax credits on account of EI and CPP, pursuant to section 118.7 of the *Income Tax Act*, which reads in part:

> 118.7 For the purpose of computing the tax payable under this Part by an individual for a taxation year, there may be deducted an amount determined by formula
>
> A x B,
>
> where
>
> A is the appropriate percentage for the year; and
>
> B is the total of
>
> (*a*) the total of all amounts each of which is an amount payable by the individual as an employee's premium for the year under the *Employment Insurance Act*, not exceeding the maximum amount of such premiums payable by the individual for the year under that *Act*,
>
> (*b*) the total of all amounts each of which is an amount payable by the individual for the year as an employee's contribution

> under the *Canada Pension Plan* or under a provincial pension plan defined in section 3 of that *Act*, not exceeding the maximum amount of such contributions payable by the individual for the year under the plan, …

The employee shares responsibility equal with the employer for the amount of the payment of premiums. Being an employee of the Carlow Group, if the corporation became liable for the payment of EI premiums and CPP contributions, then the Appellant is therefore entitled to a credit.

[15] Unfortunately for the Appellant, there is no corresponding provision in the *Income Tax Act*. As stated by Noel J. in *Neuhaus v. The Queen*[4] in circumstances that could be compared to the present Appellant:

> 5 The problem raised by the applicant is a collection problem. In this regard, section 222 assigns jurisdiction to the Federal Court in these words:
>
> | | |
> |---|---|
> | All taxes, interest, penalties, costs and other amounts payable under this *Act* are debts due to Her Majesty and recoverable as such in the Federal Court ... | Tous les impôts, intérêts, pénalités, frais et autres montants payables en vertu de la présente loi sont des dettes envers Sa Majesté et recouvrables comme telles devant la Cour fédérale [...] |
>
> 6 Insofar as the applicant claims to have already paid the taxes being claimed from her, she may assert her rights in the Federal Court when the Minister attempts to recover the sums he considers payable. …

[16] In conclusion, the appeal is allowed only to permit the Appellant to claim appropriate tax credits on account of EI premiums and CPP contributions during the years under appeal. A determination as to whether amounts on account of income tax having been withheld at source is not within the jurisdiction of this Court, pursuant to section 222 of the *Income Tax Act*. No credit for income tax should be applied against the Appellant's income tax liability for the relevant years.

Signed at Ottawa, Canada, this 24th day of November, 2008.

---

[4] 2002 FCA 391.

"C.H. McArthur"

McArthur J.

CITATION:	2008 TCC 620
COURT FILE NO.:	2007-656(IT)I
STYLE OF CAUSE:	GARY K. O'HARA and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	September 26, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice C.H. McArthur
DATE OF JUDGMENT:	December 19, 2007

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Devon Peavoy

COUNSEL OF RECORD:

For the Appellant:

Name:	N/A
Firm:	N/A
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada