

Docket: 2007-2819(IT)G

BETWEEN:

ROMAN HERCHAK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 24, 2009 at
Vancouver, British Columbia

Before: The Honourable Justice L.M. Little

Appearances:

Counsel for the Appellant: Peter Kravchuke

Counsel for the Respondent: Victor Caux

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2005 taxation year is dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this 30th day of September 2009.

“L.M. Little”

Little J.

Citation: 2009 TCC 486
Date: 20090930
Docket: 2007-2819(IT)G

BETWEEN:

ROMAN HERCHAK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Little J.

A. FACTS

[1] In the 2005 taxation year, the Appellant was employed by Chemonics International Incorporated (“Chemonics”).

[2] The issue before the Court is whether the Appellant qualifies for a deduction in the amount of \$108,687.00 pursuant to subparagraph 110(1)(f)(iii) of the *Income Tax Act* (the “Act”).

[3] At the commencement of the hearing the parties filed an Agreed Statement of Facts (Exhibit A-1, Tab 1). The Agreed Statement of Facts reads as follows:

AGREED STATEMENT OF FACTS

1. In 1999, after Kosovo had been separated from Yugoslavia, the United Nations Security Council passed Resolution 1244 authorizing the UN to assume governance of Kosovo.

2. From January 10, 2005 through November 2005 (with the relevant taxation period being the 2005 calendar year), the taxpayer Roman Herchak was the full-time Senior Sales and Marketing Specialist for the Cluster and Business Support Project in Kosovo under a contract with Chemonics International Incorporated, an international, for-profit development company in the United States.
3. In turn, Chemonics had a contract with USAID (the United States Agency for International Development, an independent US federal government agency), which in turn had a contract with UNMIK (the United Nations Interim Administration Mission in Kosovo) to administer the KCBS (Kosovo Cluster and Business Support program), a program designed by USAID to meet the objectives (in the areas of justice, the military, humanitarian concerns and economic development) of the UN in Kosovo.
4. UNMIK was under the direct control of the Assistant Secretary General of the United Nations.
5. The three clusters identified for Kosovo's development included fruit and vegetables, livestock and construction materials.
6. During this period, Kosovo was being administered by the United Nations.
7. The KCBS economic development project had been proposed by USAID to the United Nations and accepted by the United Nations.
8. Herchak's role was in the economic development area and his services were donated by USAID to the United Nations.
9. Herchak was an advisor to municipalities in Kosovo (the lowest level of government) with respect to recycling of waste and the use of waste material for infrastructure and road reconstruction, but these municipalities had no control over Herchak's actions – only Chemonics had this control.
10. Herchak also worked with the five regional governments in Kosovo.
11. There were many people in Kosovo during 2005 who were paid directly by (that is, they were employees of) the United Nations.
12. Herchak was paid only by Chemonics and reported to his supervisor, another employee of Chemonics. While working on projects in Kosovo for other agencies in years prior to 2005, Herchak had been issued United Nations identification, but in 2005 he had only USAID identification.
13. Herchak's supervisor in Chemonics reported to USAID.

14. The UN could request that USAID require Chemonics to terminate Herchak if he failed to conduct himself in a manner appropriate to UNMIK/Kosovo.

15. UNMIK did not directly supervise Herchak, nor did USAID; UNMIK merely watched for the final or interim (staged) results of any activities Herchak engaged in.

16. Herchak was paid \$108,687 directly by Chemonics for the relevant period.

17. Within the program, Herchak worked on agri business, construction and association development and to identify markets and production capability to create jobs for Kosovars.

18. During the relevant period, everyone in Kosovo, even volunteers, were subject to UNMIK's guidelines; one did not have to be an employee of the UN or a contract employee to be subject to the guidelines and structures of UNMIK.

19. Herchak claimed a deduction equal to the amount paid to him by Chemonics for the relevant period, which deduction was denied by the Canada Revenue Agency.

20. Neither Chemonics nor USAID are divisions or parts of the United Nations nor are they specialized agencies as the terms are used in Income Tax Regulation 8900(1). Both Chemonics and USAID are independent international development organizations based in the United States.

21. During the relevant period, the United Nations performed its work in Kosovo partly through people directly employed by the United Nations and partly through people contracted out by others, such as USAID and, through USAID, Chemonics. The United Nations mandate to rebuild Kosovo required the United Nations to employ workers directly as well as to accept the help of independent agencies which donated projects employing third party workers.

...

B. ISSUE

[4] The parties agree that the sole issue in this appeal is whether the Appellant is entitled to deduct \$108,687.00 from his income for the relevant period pursuant to sections 3, 5 and 164, subsection 248(1) and subparagraph 110(1)(f)(iii) of the *Act* and Regulations.

C. ANALYSIS AND DECISION

[5] Subsection 110(1) of the *Act* states:

Deductions permitted

110(1) For the purpose of computing the taxable income of a taxpayer for a taxation year, there may be deducted such of the following amounts as are applicable

...

[6] Subparagraph 110(1)(f)(iii) of the *Act* reads as follows:

110.(1)(f) any social assistance payment made on the basis of a means, needs or income test and included because of clause 56(1)(a)(i)(A) or paragraph 56(1)(u) in computing the taxpayer's income for the year or any amount that is

...

(iii) income from employment with a prescribed international organization, or

...

[7] Regulation 8900 reads as follows:

8900. For the purposes of paragraph 110(1)(f) of the Act,

(a) the United Nations, and any specialized agency that is brought into relationship with the United Nations in accordance with Article 63 of the Charter of the United Nations, are prescribed international organizations; and

...

[8] The Appellant was hired by Chemonics pursuant to an Employment Agreement (the "Agreement") that he signed on December 15, 2004 (Exhibit A-1, Tab 3). The Agreement provides, in part, as follows:

11: The employee [i.e. the Appellant] will provide professional services to Chemonics and other contract parties/clients as specified for the position title in the job description attached to this agreement... The employee further agrees to perform his duties faithfully and to the best of his ability, to comply with local laws and customs, and to conduct himself in a manner appropriate to UNMIK Kosovo.

[9] In order to succeed in his appeal the Appellant must establish that the \$108,687.00 that he claims as a deduction under subparagraph 110(1)(f)(iii) was an amount that he received from employment with the United Nations.

[10] A somewhat similar issue has been considered by the Tax Court on a number of occasions.

[11] The Tax Court considered a similar issue in the decision of *Creagh v. Canada*, [1997] 1 C.T.C. 2392. In that case, the Appellant had argued that he was entitled to the exemption from tax provided in subparagraph 110(1)(f)(iii) because he was employed by the United Nations. The facts indicated the Appellant was an employee of Canadian Helicopter who earned income while participating in a peacekeeping mission in Cambodia. The Court reviewed the relevant provisions and stated that, to succeed in a claim of the type being made by the Appellant, there has to be a contractual relationship between the taxpayer and the United Nations. It is not enough that a taxpayer works on a peacekeeping mission, the worker has to be employed by the United Nations. The Court found that the exemption did not apply.

[12] In *Godin v. The Queen*, [1998] 2 C.T.C. 2853, the Tax Court reviewed the same provisions and clearly stated that, to obtain an exemption under paragraph 110(1)(f), a taxpayer has to be employed by the United Nations.

[13] Counsel for the Respondent suggested that the *Godin* decision is directly on point with the matter before this Court. In that case, the taxpayer worked in Yugoslavia under the direction of the United Nations. The taxpayer in that appeal was contracted with an organization, CARE Canada, which provided services to Canadian Commercial Corporation which, in turn, had a contract with the United Nations. In the end, the Court found that clearly there was no contract between the taxpayer and the United Nations, therefore there could be no deduction pursuant to paragraph 110(1)(f).

[14] Counsel for the Respondent said this is precisely the situation before the Court today. Mr. Herchak contracted with Chemonics who was his employer and Chemonics contracted with USAID who had a contract with the United Nations in Kosovo. There is no evidence to suggest that the Appellant had a contractual relationship with the United Nations. Unlike the situation in *Godin*, here the Appellant was not subject to the day-to-day direction of the United Nations. Counsel for the Respondent said that Mr. Herchak's circumstances weigh against

the finding that he was employed by the United Nations even more strongly than the facts in the *Godin* decision.

[15] In *Lalancette v. The Queen*, 2001 D.T.C. 352, the Tax Court dealt with a taxpayer who was a police officer “on loan” to the United Nations for a mission in Haiti. The taxpayer in that case was apparently subject to United Nations authority and daily supervision. The taxpayer was also apparently granted rights and immunities as a representative of the United Nations. The Court in *Lalancette* stated that a taxpayer cannot unilaterally declare himself to be an employee of the United Nations, and evidence from the United Nations is necessary for a successful claim.

[16] The Tax Court’s decision in *Lalancette* was confirmed by the Federal Court of Appeal, 2002 FCA 335. The Federal Court of Appeal stated that the taxpayer was not an employee of the United Nations, as ultimate control of the taxpayer remained with the R.C.M.P. Although daily control of the Appellant may have rested with the United Nations in Haiti, ultimately the Appellant was controlled by the R.C.M.P. In this situation, the Appellant may have been operating in a country subject to governance by the United Nations, but it is clear that ultimately control of the Appellant lay with Chemonics who hired, supervised and was responsible for any termination of the Appellant’s contract.

[17] In *Smyth v. The Queen*, 2007 D.T.C. 1129, the Tax Court dealt with the appeal of a taxpayer who was a police officer working in Kosovo during 2001 and 2002. The Appellant argued that he was employed by the United Nations, however, the Tax Court found that the taxpayer received his pay from the Edmonton Police Service (“EPS”), was covered by the EPS benefit plan and the EPS retained control over the taxpayer in the event that United Nations’ guidelines were breached.

[18] In this situation, the Appellant was hired by Chemonics under terms and conditions represented by the Agreement that he signed with Chemonics on December 15, 2004. The Agreement clearly states that the Appellant is an employee of Chemonics.

[19] The Appellant worked on a project that was in support of the United Nations’ mandate in Kosovo. The United Nations entered into a contract with USAID, who then contracted with Chemonics to provide services in support of a project proposed by USAID. USAID donated the Appellant’s services to the United Nations, but there is no evidence of the employer/employee relationship between the Appellant and the United Nations.

[20] There is no evidence before this Court to suggest that the United Nations considered the Appellant to be an employee. In fact, the opposite is true in that the Appellant was issued United Nations identification in prior years, but in 2005 he had only USAID identification.

[21] All of the evidence before the Tax Court in the current matter points to the fact that the Appellant was employed by Chemonics.

[22] In the court decisions referred to above, the Tax Court has held that when a person is hired by a company, which contracts with a corporation which, in turn, has a contract with the United Nations, there is no deduction pursuant to paragraph 110(1)(f) of the *Act*. The Appellant remained the employee of Chemonics despite working in the course of a project in a United Nations controlled country.

[23] As stated by the Federal Court of Appeal in *Lalancette*, the relevant enquiry for determining whether a taxpayer is an employee of the United Nations is determining who controls the employee. In this appeal, the evidence is clear that the United Nations did not control the Appellant, either directly on a day-to-day basis or ultimately in terms of discipline or termination.

[24] Before closing, I wish to state that I was very impressed with the evidence provided by the Appellant. It is apparent that he made a very significant contribution to assist in the economic development of Kosovo. He is to be commended for his efforts in assisting the people of Kosovo.

[25] The appeal is dismissed, with costs to the Respondent.

Signed at Vancouver, British Columbia, this 30th day of September 2009.

“L.M. Little”

Little J.

CITATION: 2009 TCC 486

COURT FILE NO.: 2007-2819(IT)G

STYLE OF CAUSE: Roman Herchak and
Her Majesty the Queen

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: September 24, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice L.M. Little

DATE OF JUDGMENT: September 30, 2009

APPEARANCES:

Counsel for the Appellant: Peter Kravchuke

Counsel for the Respondent: Victor Caux

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