

Citation: 2009 TCC 577
Date: 20091116
Docket: 2008-2822(IT)I

BETWEEN:

ROBERT LUST,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Agent for the Appellant: Donald Lust
Counsel for the Respondent: Whitney Dunn

REASONS FOR JUDGMENT

**(Delivered orally by teleconference on September 4, 2009,
at Vancouver , British Columbia)**

McArthur J.

[1] This appeal is from a reassessment by the Minister of National Revenue for the 2005 taxation year which added \$7,000 to the Appellant's income together with a gross negligence penalty of approximately \$770.

[2] Briefly the facts include the following. Extrac Minerals Inc., a corporation I believe now situate, or at least in 2005 was situate in Osoyoos, B.C. was managed by the Appellant's father, Donald Lust, whom I shall refer to as Mr. Lust. The corporation paid the following amounts to the Appellant:

October 28, 2005, by money order for \$1,000;

November 15, 2005, cheque number 287 for \$1,500, which cheque had noted on the Re: line "Contract for Hire";

November 25, 2005, cheque number 288 for \$1,500; and

December 29th, '05, cheque number 294 for \$3,000, which also indicates on the Re: line "Contract for Hire".

[3] The amount was paid from a contract of services between the Appellant and Extrac but, according to the Minister position, the Appellant failed to report that income in 2005. Mr. Lust, who described his occupation as researcher, now retired, stated that the wording "Contract for Hire" meant a private contract and not an employment contract. However, this explanation contradicts the ordinary meaning of the phrase and the *Canadian Oxford Dictionary* defines "hire" as "employ a person for wages or fee".

[4] The only evidence presented was from the Minister's auditor, Michael LeBlanc, who was the Appellant's subpoenaed witness, and from Donald Lust, the Appellant's father, who also acted as agent. The Appellant was present throughout the hearing, but did not testify. I informed Mr. Lust that I may infer an adverse interest, and that is, in this instance that his son did not testify because his evidence may have been adverse or contrary to his own best interest. In other words, it may hurt rather than advance his position. I believe Mr. Lust clearly understood this and took that risk. He mentioned he did not want to submit his son to a "vigorous" cross-examination by the Respondent.

[5] Mr. LeBlanc was examined in-chief by Mr. Lust who was preoccupied with what he believes is the unsatisfactory manner in which CRA in general, and Mr. LeBlanc, in particular, handled dealings with the Appellant. On Mr. LeBlanc's part, he testified that the Appellant was not forthcoming and perhaps evasive. Mr. LeBlanc, concluded that the three cheques and a money order were payment by Extrac for services rendered by the Appellant to that company, either as an employee or an independent contractor.

[6] Two of the three cheques totally \$4,500, stated "Contract for Hire". The four amounts were dated from October 28th through to December 29th, 2005 and Mr. Lust explained that he had been ill and/or in Medicine Hat during this period and his son helped out with his duties. During 2005, the Appellant also received approximately \$53,037 employment income from BJ Services Company Canada.

[7] Mr. Lust issued the payments to his son on behalf of Extrac Minerals, whose head office, according to the government filings, was Medicine Hat, Alberta, although Mr. Lust stated that in 2005, the original company had been allowed to die, and the new company out of Osoyoos had arisen.

[8] He complained about the lack of information received from CRA and Mr. LeBlanc. That may be accurate, but on the other side of the coin, he and the Appellant were extremely secretive and withheld much of the specifics with respect to the \$7,000. I was just left to guess with respect to details.

[9] In a letter under the Appellant's exhibit in tab 8 I believe, there is a copy of a letter written by an appeals officer to the Appellant, in Osoyoos, B.C. clearly setting out the Minister's position. In effect, the letter says to Robert:

You received 7,000 from Extrac, if it wasn't income, then what was it? Please explain.

[10] Unfortunately and perhaps sadly, the Appellant goes on about what it was not, and what it could have been. He received a clear, straight question, no subterfuge, no tricks, no other meaning. The Minister was looking for an honest answer. What he received from the Appellant was what might be described as smoke and mirrors, and in that regard, I refer to Exhibit A-1, Tab 9. In that letter, the Appellant wrote the appeals officer, in part thanking him or her for the letter of April 8th and stating:

As stated before these amounts could not have been income as Extrac does not have, nor has ever had, any employees.

[11] And my comment to that is, well, that may be so, but it did not have to be paid to the Appellant as an employee to be taxable income in his hands. The explanation offered by the Appellant was that he received no remuneration for his services, the payments were to reimburse him for material purchase for the company and other expenses. For the most part, these expenses were totaling \$6,300, while the expenses referred to by the Appellant totaled the whole \$7,000. But \$6,327 of those expenses in two amounts, \$3,420 and \$2,907, apparently represented a chemical with a special formula, perhaps shipped by a Panamanian corporation, Salmo Research Inc. All other details are left unexplained. The two invoices from Salmo lack detail and clarity.

[12] The tax, as indicated on these Salmo invoices is 7%, from which one might infer was GST. But Salmo apparently was not a GST registrant, and I presume that the tax

was never paid to the Respondent. No cancelled cheque from the Appellant to Salmo was produced, nor was there any evidence that the Appellant had withdrawn these relatively large amounts from his bank account to pay the amounts in cash as stated. We are left with hardly a smidgeon of direct evidence. No bills of lading, no details with respect to who Salmo was, no evidence on behalf of Salmo, and no quantity or aspects of the chemicals used were forthcoming, although it may have been a secret formula and I understand that if it was. No corroboration, just general statements which Mr. Lust gave, which are hearsay at best as he was not there because he was either ill, or and in Medicine Hat, as far as I understood.

[13] There were other expenses, receipts in Exhibit A-1, Tab 2 that are not helpful, for example, Bel-Air Motel in Medicine Hat; a bill to Extrac; Smitty's Pancake House, Fernie, B.C.; and a restaurant in Penticton; an Osoyoos hardware store.

[14] Tab 3 of Exhibit A-3 contains a two ledger handwritten pages totaling \$2,400 for supplies, parts, lab. Again, no invoice receipts, no details, no indication who paid the amounts, how much and to whom or why. Tab 3 also includes a bank statement for Robert and Donald Lust with an Osoyoos address. This was submitted, I believe, to indicate various cash withdrawals in October, November and December 2005. These are of little assistance to corroborate that Robert paid Extrac expenses of \$7,000 in cash. The cash withdrawals cannot be reconciled, or at least I could not, and do not corroborate the cash payments to Salmo. The cash withdrawals are equally consistent with the day-to-day, week-to-week, month-to-month normal cost of living expenses of both parties.

[15] The purchase orders in Exhibit A-4 were prepared by Mr. Lust. They are vague, self-serving and of very little evidentiary value. As stated earlier, the Appellant was more focused on establishing improper treatment by CRA than dealing with the simple issue of whether he received \$7,000 in unreported income in 2005, well evidenced by three cheques and a money order from Extrac.

[16] The Appellant suggested in his letter under Tab 9 of Exhibit A-1 that the cheques he received could have been for any number of reasons, and he lists six, but they are prefaced with "could have been". I am asked to guess. He states that Extrac books of records are held at the foundation headquarters, unavailable in the timeframe requested. Well, they were still unavailable at trial.

[17] Another mystery is I believe Mr. Lust had been the sole director and shareholder of Extrac, which was incorporated in Alberta with a head office in Medicine Hat. He now states that the company no longer exists in that form, but now is perhaps owned

and operated by a foundation, which is no more than a phantom without relevant details, nobody appearing on behalf of the foundation. Again, Tab 8 clearly sets out the Minister's position. The Minister is saying "Please provide an explanation for why the money was paid to you." This is clear and unambiguous. Rather than providing an explanation the Appellant saw fit to write a very vague reply.

[18] Contrary to the Appellant's understanding of the issues, again the question boils down to whether the \$7,000 received by the Appellant was used by him to pay for materials and other extract related expenses. We know from Mr. Lust's testimony, that at in October, November and December 2005, Robert took over his father's position as manager of Extrac. We know as a fact that the Appellant Robert was paid a total of \$7,000 with at least \$4,500 in cheques noted "Contract for Hire". We also know that hire means to employ a person for wages. The Appellant did not testify, and I infer that there was evidence that he did not wish to divulge. Finally, the obvious conclusion at this point is that the \$7,000 was income.

[19] To counter this, the Appellant's agent set out to establish that the \$7,000 was a repayment to the Appellant for the money he expended on Extrac's behalf. He, the Appellant, had the onus of establishing this, and failed to do so. The explanations put forward are not plausible. The largest expenditures totaling \$6,327 were presented by Mr. Lust's evidence of two Salmo invoices. The oral evidence was uncorroborated and unconvincing. The Appellant, the only one apparently with the personal knowledge, did not come forward and testify giving the details of the cash purchases of the chemicals, how, when, where, why and how much. The invoices are again without details: no description of the goods purchased; no address or telephone for Salmo; the tax referred to is suspect without corroboration.

[20] I do not accept these vouchers as being authentic. I could not reconcile the amounts of the lesser expenditures referred to in Tabs 2 and 3, and do not accept their relevancy.

[21] For these reasons I conclude that the Appellant has not met the burden of reversing the Minister's assumption that the \$7,000 was and is taxable income.

[22] With regard to penalties, again, the Appellant did not testify. The Minister had the burden of proving that in the 2005 taxation year, in accordance with subsection 163(2) of the *Act*, the Appellant knowingly or under circumstances amounting to gross negligence, made a false statement in his return of income for that taxation year by not reporting the amount.

[23] The onus was on the Minister to prove gross negligence, and the onus is a stronger one than the onus on the Appellant with regard to the assumptions. The onus is greater than on a balance of probabilities, and closer to the criminal onus under the *Criminal Code* than it is to a balance of probabilities.

[24] The appeal is allowed only to delete the imposition of penalties. The Minister shall add the additional sum of \$7,000 to the Appellant's taxable income for the taxation year 2005 as previously assessed.

Signed at Ottawa, Canada, this 16th day of November, 2009.

“C.H. McArthur”

McArthur J.

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COURT FILE NO.: 2008-2822(IT)I

STYLE OF CAUSE: ROBERT LUST and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Kelowna , British Columbia

DATE OF HEARING: September 1, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice C.H. McArthur

DATE OF JUDGMENT: September 14, 2009

APPEARANCES:

Agent for the Appellant: Donald Lust
Counsel for the Respondent: Whitney Dunn

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