

Docket: 2008-4022(IT)I

BETWEEN:

EARL BABICH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard together on common evidence with the appeal of *Able Enterprises Ltd.* 2008-4024(GST)I on April 29-30, 2010, at Vancouver, British Columbia

Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant: The Appellant himself
Counsel for the Respondent: Matthew Canzer

JUDGMENT

Upon a Motion by the Respondent for an Order of this Court quashing the Appellant's purported appeal from the reassessment made under the *Income Tax Act* for the 2004 taxation year;

The motion is allowed, without costs, and the purported appeal is quashed.

Upon a Motion by the Respondent for an Order of this Court to amend the Reply, the motion is granted.

The appeal from the reassessment made under the *Income Tax Act* for the 2003 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 24th day of June 2010.

“V.A. Miller”

V.A. Miller, J.

Docket: 2008-4024(GST)I

BETWEEN:

ABLE ENTERPRISES LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard together on common evidence with the appeal of *Earl Babich*
2008-4022(IT)I on April 29-30, 2010, at Vancouver, British Columbia

Before: The Honourable Justice Valerie Miller

Appearances:

Agent for the Appellant: Earl Babich
Counsel for the Respondent: Matthew Canzer

JUDGMENT

The appeal from the reassessment under the *Excise Tax Act*, notice of which is dated July 16, 2007, for the period March 1, 2002 to February 29, 2004 is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 24th day of June 2010.

“V.A. Miller”

V.A. Miller, J.

Citation: 2010TCC352
Date: 20100624
Docket: 2008-4022(IT)I

BETWEEN:

EARL BABICH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2008-4024(GST)I

BETWEEN:

ABLE ENTERPRISES LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller, J.

[1] The Appellant Earl Babich (“Babich”) has appealed the reassessment of his 2003 and 2004 taxation years. The Appellant Able Enterprises Ltd (“Able”) has appealed the reassessment of its reporting periods March 1, 2002 to February 29, 2004. These appeals were heard on common evidence.

Preliminary Matters

[2] As a preliminary matter, the Respondent brought two motions with respect to Babich’s appeal – a motion to quash the appeal for the 2004 taxation year and a motion to amend the Reply.

[3] The ground for the motion to quash was that the Notice of Reassessment dated September 25, 2008 for the 2004 taxation year was a nil assessment.

[4] The Respondent relied on the affidavit evidence of Daryl Argue, an Officer of the Canada Revenue Agency (“CRA”). Included in the affidavit was a reconstructed Notice of Reassessment dated September 25, 2008. It confirmed that the federal taxes assessed in the notice were nil. The nil assessment was as a result of CRA’s acquiescence to Babich’s request that employment income of \$8,990 be removed from his income in 2004.

[5] There is no appeal from a notice which assesses no federal taxes. This was discussed by Noël J.A. in *Interior Savings Credit Union v. Canada*¹ at paragraph 17 where he stated:

[17] Nonetheless, the term nil assessment is often used in the case law to identify an assessment which cannot be appealed. There are two reasons why a so-called nil assessment cannot be appealed. First, an appeal must be directed against an assessment and an assessment which assesses no tax is not an assessment (see *Okalta Oils Limited v. MNR*, 55 DTC 1176 (SCC) at p. 1178: “Under these provisions, there is no assessment if there was not tax claimed”). Second, there is no right of appeal from a nil assessment since: “Any other objection but one related to an amount claimed [as taxes] was lacking the object giving rise to the right of appeal ...” (*Okalta Oils, supra*, at p. 1178).

[6] The motion to quash Babich’s appeal of his 2004 taxation year is granted.

[7] The Respondent sought to amend the Reply to Notice of Appeal on the grounds that the Minister of National Revenue (the “Minister”) had assessed Babich for a benefit conferred on a shareholder pursuant to subsections 15(1) and 15(5) of the *Income Tax Act* (the “Act”) and these subsections were not included in the Reply.

[8] Babich consented to the amendment and the motion to amend the Reply was granted.

Issues

[9] The issues in the two appeals are related. The issue in Babich is whether he received a benefit from the personal use of an automobile which was owned by Able. If he did receive a benefit, then the quantum of that benefit is also disputed.

[10] The issues raised in the notice of appeal for Able are:

- a) if there was a benefit conferred on Babich, did Able have to collect GST with respect to the benefit; and,
- b) in 2002, should the amount of \$12,624.41 have been allocated to Able's GST account or its payroll source deduction account.

Babich Appeal

[11] Able was incorporated in 1999 under the *British Columbia Corporations Act*. Babich is its sole shareholder and director. Able began operations in 2000 as a supplier of firewood. In 2001, it built a saw mill and began selling cedar shakes. In 2004, the mill burned down and it was not replaced as there was no fire insurance. Since that time, Able has earned its income from the sale of firewood.

[12] In 2002, Babich purchased a 2002 Hyundai XG350 (the "Automobile"). He executed a bare trust agreement so that he held legal title for the automobile and Able was the beneficial owner. After representations made by Babich, the CRA accepted that the Automobile was a business asset, allowed Able to claim an input tax credit for the Automobile, and reclassified it from Class 10 to Class 10.1.

[13] Babich did not keep any records with respect to the use of the Automobile. At the audit stage of this matter, Babich met with Tim Knight, an employee of the CRA to discuss the business use of the Automobile. Based on representations made by Babich to Mr. Knight, it was estimated that the business use of the Automobile was 75% in 2003 and 2004 and that the Automobile was driven a total of 41,316 kilometers in both 2003 and 2004.

[14] At the hearing of these appeals Ernest Babich, Earl Babich's father, gave evidence on behalf of the Appellants. He has been the general manager of Able since 2000. He stated that he and his wife, Betty Babich were the only individuals who used the automobile in 2003 and 2004.

[15] Ernest Babich testified that he and his wife used the automobile to pick up materials and supplies for Able; to collect cheques from Able's customers; to drive

employees to and from their home and the mill; to do the banking for Able; and, to drive themselves to and from home and the mill. Neither he nor his son kept a log with respect to the use of the Automobile.

[16] Ernest Babich's evidence was ambiguous with respect to his use of the Automobile. At one point he stated that the Automobile was used by him and his wife for business and personal purposes and later he stated that it was used 100% for business.

[17] Ernest Babich stated that his previous vehicle had been repossessed and he purchased the Automobile in his son's name so that he, Ernest Babich, could work for Able.

[18] Babich tendered two letters from the Insurance Corporation of British Columbia. They showed that for policy number 385DGH, he was registered as the owner of the Automobile and Ernest Babich was shown as the principal operator of the Automobile.

[19] At no time did Babich tell any representative of CRA that his father was the principal user of the Automobile. This information was first revealed when Ernest Babich gave his evidence. Ernest Babich was under the mistaken belief that if it were revealed that he used the Automobile, no benefit would be assessed to his son.

[20] I conclude from the evidence presented at the hearing that the Automobile was purchased in Babich's name for his parents' use. I find that Ernest Babich and his wife were the only users of the Automobile and they used it for both personal and business purposes.

[21] The relevant sections of the *Income Tax Act* (the Act) are as follows:

15. (1) Benefit conferred on shareholder -- Where at any time in a taxation year a benefit is conferred on a shareholder,

...

the amount or value thereof shall, except to the extent that it is deemed by section 84 to be a dividend, be included in computing the income of the shareholder for the year.

15. (5) Automobile benefit -- For the purposes of subsection (1), the value of the benefit to be included in computing a shareholder's income for a taxation year with respect to an automobile made available to the shareholder, **or a person**

related to the shareholder, by a corporation shall (except where an amount is determined under subparagraph 6(1)(e)(i) in respect of the automobile in computing the shareholder's income for the year) be computed on the assumption that subsections 6(1), (1.1), (2) and (7) apply, with such modifications as the circumstances require, and as though the references therein to "the employer of the taxpayer", "the taxpayer's employer" and "the employer" were read as "the corporation". (emphasis added)

6. (1) Amounts to be included as income from office or employment -- There shall be included in computing the income of a taxpayer for a taxation year as income from an office or employment such of the following amounts as are applicable:

(e) **standby charge for automobile** -- where the taxpayer's employer or a person related to the employer made an automobile available to the taxpayer, or to a person related to the taxpayer, in the year, the amount, if any, by which

(i) an amount that is a reasonable standby charge for the automobile for the total number of days in the year during which it was made so available

exceeds

(ii) the total of all amounts, each of which is an amount (other than an expense related to the operation of the automobile) paid in the year to the employer or the person related to the employer by the taxpayer or the person related to the taxpayer for the use of the automobile;

6. (1)(k) automobile operating expense benefit -- where

(i) an amount is determined under subparagraph (e)(i) in respect of an automobile in computing the taxpayer's income for the year,

(ii) amounts related to the operation (otherwise than in connection with or in the course of the taxpayer's office or employment) of the automobile for the period or periods in the year during which the automobile was made available to the taxpayer or a person related to the taxpayer are paid or payable by the taxpayer's employer or a person related to the taxpayer's employer (each of whom is in this paragraph referred to as the "payor"), and

(iii) the total of the amounts so paid or payable is not paid in the year or within 45 days after the end of the year to the payor by the taxpayer or by the person related to the taxpayer,

the amount in respect of the operation of the automobile determined by the formula

A - B

where

A is

(iv) where the automobile is used primarily in the performance of the duties of the taxpayer's office or employment during the period or periods referred to in subparagraph (ii) and the taxpayer notifies the employer in writing before the end of the year of the taxpayer's intention to have this subparagraph apply, $\frac{1}{2}$ of the amount determined under subparagraph (e)(i) in respect of the automobile in computing the taxpayer's income for the year, and

(v) in any other case, the amount equal to the product obtained when the amount prescribed for the year is multiplied by the total number of kilometres that the automobile is driven (otherwise than in connection with or in the course of the taxpayer's office or employment) during the period or periods referred to in subparagraph (ii), and

B is the total of all amounts in respect of the operation of the automobile in the year paid in the year or within 45 days after the end of the year to the payor by the taxpayer or by the person related to the taxpayer;

[22] I conclude from all of the evidence that a benefit was conferred on Babich. The Automobile was owned by Able and all expenses were paid by Able. Babich was the sole shareholder of Able and he allowed his parents to have exclusive use of the Automobile for both personal and business purposes. According to subsection 15(5), the value of the benefit to be included in a shareholder's income with respect to an automobile relates to an automobile made available to the shareholder or to a person related to the shareholder.

[23] The Minister of National Revenue (the Minister) has calculated that the value of the benefit to be included in Babich's income for 2003 is a standby charge of \$5,097.45 and an operating benefit of \$1,706.80 for a total of \$6,804.25. His calculations were based on the assumptions that the acquisition cost of the Automobile was \$42,318²; the total kilometers driven in 2003 were 41,316; that 25% of the kilometers driven annually with the Automobile were for personal reasons; and, that the number of kilometers driven for personal purposes was 10,040.

[24] The Minister based his assumptions on data and representations given to him by Babich. Babich now bears the burden of showing that the Minister's assumptions were incorrect. This he failed to do. He has not brought any evidence which

challenged the calculations and the assumptions made by the Minister with respect to the imposition and amount of a standby charge and operating benefit.

[25] It was Babich's position that he should be able to setoff the benefit included in his income against the shareholder loan which Able owed to him.

[26] There was no evidence with respect to whether a shareholder loan existed. As well, section 15 is designed to prevent corporations from using an indirect means of conferring an untaxed economic benefit on its shareholders.

[27] Babich's appeal is dismissed.

Able Appeal

[28] Pursuant to section 173 of the *Excise Tax Act*, Able is deemed to have collected GST on the benefit which was included in Babich's income under the *Income Tax Act*. The amount of GST which is deemed to have been collected is \$373.88 for the period ending February 28, 2003 and \$373.88 for the period ending February 29, 2004. However, the actual amounts assessed by the Minister were \$373.84 in each period. I conclude from the evidence that Able was correctly assessed for GST on the benefit included in Babich's income.

[29] The second issue raised by Able was whether, in 2002, the amount of \$12,624.41 should have been allocated to Able's GST account or its payroll source deduction account?

[30] The facts relating to this issue are succinctly described in a letter dated May 28, 2007 from Alan McDonell, a Collections Officer with the CRA to Earl Babich. The second paragraph of that letter reads:

In response to your previous enquiry in March of 2007, we conducted a thorough review of your account. We determined that in July of 2000, we issued a Requirement to Pay (garnishee) to Gibson's Pass Resorts Inc. and recovered \$12,624.41, which was applied to the arrears for Babich Enterprises Ltd. These funds were later transferred to the payroll source deductions account for Able Enterprises Ltd In May of 2003. The review found that in December of 2002, we conducted a Payroll Source Deductions Examination and, since we were unaware of the moneys that would later be transferred, we levied penalties and interest on unremitted source deductions for 2000, 2001, and 2002. All of the penalties and interest has now been cancelled and credits created in the process, have been

applied to the amounts assessed at the time of the Payroll Source Deductions Examination in January of 2005. As a result of these adjustments, your balance has decreased to \$244.98 as at May 28, 2007. I have requested that a detailed statement of accounts be mailed to you. It should arrive within 6 weeks.

[31] Whether the amount of \$12,624.41 ought to have been credited to Able's GST account or its payroll source account is not an issue that this court has jurisdiction to decide.

[32] In conclusion, Able's appeal is dismissed.

Signed at Ottawa, Canada, this 24th day of June 2010.

“V.A. Miller”

V.A. Miller, J.

¹ [2007] FCA 151

² Exhibit R-1, tab 3

CITATION: 2010TCC352

COURT FILE NO.: 2008-4022(IT)I

STYLE OF CAUSE: EARL BABICH AND
HER MAJESTY THE QUEEN

COURT FILE NO.: 2008-4024(GST)I

STYLE OF CAUSE: ABLE ENTERPRISES LTD. AND
HER MAJESTY THE QUEEN

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: April 29-30, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller

DATE OF JUDGMENT: June 24, 2010

APPEARANCES:

For the Appellant: Earl Babich
Counsel for the Respondent: Matthew Canzer

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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