9098-9005 Quebec Inc v The Queen, 2012 TCC 324

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Is a managing director of a partnership who receives additional income for the management duties an officer of the partnership?

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At issue was whether the Minister has properly assessed the appellant corporation as a personal services business on the basis that its sole shareholder could reasonably be regarded an "officer" of the entity that was provided services - being a de facto partnership under Quebec law - absent the corporation (s 125(7).

The Court went through the text of the ITA and previous decision to determine that an "office" held by an "officer" has the following characteristics:

- is a position entitling one to a fixed or ascertainable stipend or remuneration;
- denotes a subsisting, permanent, substantive position which has an existence independent of the person who fills it;
- does not require the individual to be in the service of some other person;
- is created by statute or some other instrument instead of being created by or dependent upon a contract of service between an employer and the particular holder of the position.
- The duration of the term that a particular person occupies a position is irrelevant.
- The fact that the position must be one “entitling” the individual to a stipend or remuneration means nothing more than that the position is one held for pay.

On the basis of these factors the court held that the sole shareholder could reasonably be regarded to hold an office in the partnership he was a partner in, and that the corporation was a personal services business.

FACTS

The taxpayer was reassessed for his 2003-2005 tax years on the basis that the corporation was a personal service business, thereby disallowing the small business deduction claimed.

The appellant corporation was wholly owned by LG, and had fewer than 6 employees for the relevant years. When LG's mother died, she bequeathed 13 rental properties to her three children (including LG), and those were transferred to the individuals. After the transfer of the properties, the children decided to pool the properties and develop a real estate business and other businesses and became partners in a *de facto* partnership.

The sole client of the corporation was the estate of the deceased mother, and after the transfer the sole client was the *de facto* partnership (the services rendered were the management of assets of the partnership, and were provided by the sole shareholder with the exception of

some work by another person working under the supervision of the shareholder). LG's siblings were not at all involved in the management of the business and gave no instructions on the management or development of the businesses.

ANALYSIS

Meaning of "Officer"

The Court began by discerning the meaning of the term "officer" as used in the ITA. The Court began with the definitions of "officer", "employee", and "employment" in subsection 248(1), which reads:

> “office” means the position of an individual entitling the individual to a fixed or ascertainable stipend or remuneration and includes a judicial office, the office of a minister of the Crown, the office of a member of the Senate or House of Commons of Canada, a member of a legislative assembly or a member of a legislative or executive council and any other office, the incumbent of which is elected by popular vote or is elected or appointed in a representative capacity and also includes the position of a corporation director, and “officer” means a person holding such an office;
>
> “employee” includes officer;
>
> “employment”: means the position of an individual in the service of some other person (including Her Majesty or a foreign state or sovereign) and “servant” or “employee” means a person holding such a position.

The Court then looked at the case law.

In *Guérin v. M.N.R.*, 52 DTC 118 (I.T.A.B.), a judge who temporarily sat as chairman of various arbitration boards, receiving a daily stipend and sought to deduct expenses incurred. The minister, in that case, argued that the judge was acting as employee or officer so as to deny the deduction. The ITAB found that since the number of sitting days was not known or knowable, the remuneration was neither fixed or ascertainable from the outset, since " position entitling one to a fixed or ascertainable stipend or remuneration” parliament, in my opinion, meant a position carrying such a remuneration that when accepting it a person knows exactly how much he will receive for the services he is called upon to render", […] and that the term "office" " as defined, implies continuity and permanence; it can certainly not be said that there is continuity or permanence in the duties of a member of an arbitration board."

In *MacKeen v. M.N.R.*, 67 DTC 281 (T.A.B.), a person appointed as a member of a royal commission was found not to hold an office, and the TAB quoted from " G. S. A. Wheatcroft in

The Law of Income Tax, Surtax and Profits Tax, (1962), at page 1057, 1-107, says that: “The word ‘office’ denotes a subsisting, permanent, substantive position which has an existence independent of the person who fills it, and which goes on and is filled in succession by successive holders.” Acting as a commissioner on a special and limited commission, royal or other, limited as to terms and duration, has none of the characteristics of an office or an employment."

In *Merchant v. The Queen*, 84 DTC 6215 (F.C.T.D.), the decisions in *MacKeen and Guerin* were criticized in the circumstances of whether a leadership candidate in a political party held an office. The FCTD noted that the definition of "office" is not inclusive, but was closed (sing the word "means") and mandatory, requiring that the remuneration must be fixed and ascertainable. "Ascertainable" means only that the amount is capable of being made known, of capable of being determined but not a definite sum be known by the office holder at the commencement of holding office. The word must have some meaning beyond "fixed" or else it is completely redundant." But, where the person engaged is required to incur various expenses, the quantum of which is not known, they render the remuneration received "not ascertainable".

In *Payette v. Canada* (*Minister of National Revenue*), [2002] T.C.J. No. 386 (QL), the reasoning in *Merchant* was criticised because " The words “stipend” and “remuneration” mean gross income, not income net of expenses", and that " the descriptor “ascertainable” must refer to something that can be ascertained a priori; otherwise it would have no meaning since everything can be ascertained a posteriori. Thus if the “stipend” or “remuneration” is not fixed, it must still be ascertainable in advance with at least some degree of accuracy by using some formula or by referring to certain set factors."

In *Vachon (Estate v. Canada)*, 2009 FCA 375, [2009] F.C.J. No. 1630 (QL), the FCA differentiated between office and volunteer positions by saying referring to the test of an "office":

> There are two requirements for meeting this second test. The office or position held must “entitle” the individual to remuneration, and this remuneration must be “fixed or ascertainable”. The fixed or ascertainable aspect of the remuneration seems to have been met, since the union officials knew exactly what the monetary conditions associated with their union leave were when they applied for a union position (Testimony of Pierre Morel, appeal book, Vol. III, p. 707).

The entitlement requirement means only that the position is held for pay. In *Nuclear Waste Management Organization v. Minister of National Revenue*, 2012 TCC 217, it was further added that the duration of the term of that a particular person occupies an office should not normally be relevant to whether there is an "office" or whether the holder has "tenure of an office".

The Court then summarized the definition of "office" in the ITA as:

- is a position entitling one to a fixed or ascertainable stipend or remuneration;

- denotes a subsisting, permanent, substantive position which has an existence independent of the person who fills it;
- does not require the individual to be in the service of some other person;
- is created by statute or some other instrument instead of being created by or dependent upon a contract of service between an employer and the particular holder of the position.
- The duration of the term that a particular person occupies a position is irrelevant.
- The fact that the position must be one “entitling” the individual to a stipend or remuneration means nothing more than that the position is one held for pay.

Can a partner be an "officer" of his own partnership?

The Court said that the ITA doesn't treat a partnership as a separate person from the partners, the principle adopted at common law, and that this lack of legal personality is now accepted in Quebec (para 26). Thus, a partner cannot be an employee of his own partnership, since a partner cannot contract with himself and cannot at the same time be both subordinate to himself and control himself. But, since an "office" doesn't require the office holder to be in service to some other person and doesn't depend on a contract, it is possible that a partner is an "officer". The Court then concluded that " as long as the position occupied by a partner entitles him to a fixed or ascertainable stipend or remuneration and has a subsisting, permanent, substantive aspect, it could certainly be considered an “office” as that term is defined in the Act and interpreted by the relevant case law".

Personal Service Business

In subsection 125(7), the ITA specified that it was targeting " the business of providing services where an individual who performs services on behalf of a corporation (incorporated employee) is a specified shareholder of the corporation and where the incorporated employee would reasonably be regarded as an officer or employee of the person or partnership to whom or to which the services were provided" [emphasis original].

The court considered why parliament has used both "officer" and "employee" in s 125(7) given that in 248(1) "employee" includes "officer". It is presumed that legislature avoids superfluous words, does not pointlessly repeat itself, and doesn't speak in vain. Every word in a statute is presumed to have meaning and statutes must be construed to give each word meaning: *McDiarmid Lumber Ltd. v. God’s Lake First Nation*, [2006] 2 S.C.R. 846; *M.N.R. v. Kitsch et al.*, 2003 DTC 5540 (F.C.A.) ; *Trans World Oil & Gas Ltd. v. The Queen*, 95 DTC 260 (T.C.C.).

BUT, courts should also avoid adopting interpretations that render portions of a statute meaningless or redundant: Placer Dome Canada Ltd. v. Ontario (Minister of Finance), [2006] 1 S.C.R. 715. The words should all be given meaning so as to get at a coherent meaning: *Novak v. Bond*, (1999), 172 D.L.R. (4th) 385 (S.C.C.); *eBay Canada Limited et al. v. M.N.R*., 2008 DTC 6728 (F.C.A.). Thus, an interpretation which does not require treating part of a statute as redundant is to be preferred over one which does: *Shell Canada Resources Ltd. v. M.N.R*., 84 DTC (F.C.A).

Based on this, and based on the statement that "includes" is an indicator of a non-exhaustive definition, the court here concluded that " there is a difference between an “officer” and an “employee”, the former being simply an inclusion in the definition of the latter. If Parliament had used only the word “officer” in the wording of its provision, then an “employee” hired under a regular contract of employment would not have fallen within the ambit of that provision."

Thus, the court held that were it not for the corporation, LG would easily be regarded as a person appointed by the partners to manage the affairs of the partnership, as an agreement between partners as to the management of the affairs of the partnership, so that he held a position similar to that of a director of a corporation: (1) there was a fixed remuneration; (2) the function he held were subsisting, permanent, substantive, with an existence separate from the person who filled it; and (3) the function was created by the partnership contract.

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