Federal Court of Appeal | Cour d'appel fédérale

Date: 20231219

Docket: A-134-22

Citation: 2023 FCA 248

CORAM: **STRATAS J.A.**
WEBB J.A.
DAWSON D.J.C.A.

BETWEEN:

ASTRO CONSULTING INC.

Appellant

And

HIS MAJESTY THE KING

Respondent

Heard at Edmonton, Alberta, on December 19, 2023.

Judgment delivered from the Bench at Edmonton, Alberta, on December 19, 2023.

REASONS FOR JUDGMENT OF THE COURT BY: WEBB J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Edmonton, Alberta, on December 19, 2023).

WEBB J.A.

[1] The Tax Court of Canada (*per* Justice D'Arcy, 2022 TCC 51) dismissed Astro Consulting Inc.'s appeal from the reassessments of its 2012, 2013 and 2014 taxation years. Astro Consulting reported the income it received from Lanmark Petroleum Holdings Ltd. (Landmark Holdings) and Lanmark Engineering Inc. (Lanmark Engineering) as income from an active business. The

reassessments were based on the Minister of National Revenue's determination that this income was from a personal services business.

[2] Aaron Glazier owned all of the issued and outstanding voting shares of Astro Consulting. His wife owned non-voting shares. As of January 1, 2012, Astro Consulting owned 20% of the shares of Lanmark Holdings. At that time there were three other shareholders. Some time during the taxation years under appeal the number of shareholders of Lanmark Holdings increased from four corporate shareholders to eight corporate shareholders and Astro Consulting's percentage of shares of Lanmark Holdings decreased to 18%. Lanmark Holdings owned all of the issued and outstanding shares of Lanmark Engineering throughout the taxation years under appeal.

[3] At the hearing before the Tax Court, Astro Consulting conceded that Aaron Glazier was a specified shareholder of Astro Consulting and, but for its existence, he would be an employee of Lanmark Engineering. Astro Consulting submitted that it did not concede that Aaron Glazier would, but for its existence, be an employee of Lanmark Holdings. However, despite being reassessed on the basis that the income from both Lanmark Holdings and Lanmark Engineering was income from a personal services business, Astro Consulting did not address the payments from Lanmark Holdings in its notice of appeal to the Tax Court nor did it raise the issue of whether, but for the existence of Astro Consulting, Aaron Glazier would be an employee of Lanmark Holdings in the notice of appeal to the Tax Court.

[4] Astro Consulting also did not make any submissions that could lead to a finding that, but for the existence of Astro Consulting, Aaron Glazier would not have been an employee of

Lanmark Holdings. Aaron Glazier was an officer and on the senior management team of Lanmark Holdings. He provided extensive management services to Lanmark Holdings (paragraph 114 of the reasons of the Tax Court Judge).

[5] Astro Consulting's argument was that it was not carrying on a personal services business because it was associated with Lanmark Holdings and Lanmark Engineering. If Astro Consulting was associated with Lanmark Holdings and Lanmark Engineering, Astro Consulting would not be carrying on a personal services business in providing services to these corporations (paragraph (d) of the definition of personal services business in subsection 125(7) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act)).

[6] Astro Consulting raised two arguments at the Tax Court hearing in support of its position that it was associated with Lanmark Holdings and Lanmark Engineering. It argued that Lanmark Holdings and Lanmark Engineering had *de facto* control of Astro Consulting for the purposes of subsection 256(5.1) of the Act. Astro Consulting also argued that it may reasonably be considered that one of the main reasons for the separate existence of Astro Consulting and Lanmark Holdings / Lanmark Engineering was to reduce taxes payable under the Act and, therefore, Astro Consulting would be associated with Lanmark Holdings and Lanmark Engineering as a result of the application of subsection 256(2.1) of the Act.

[7] The Tax Court Judge rejected Astro Consulting's arguments and found that it was not associated with Lanmark Holdings or Lanmark Engineering. Of these two arguments, the only

one being pursued by Astro Consulting in this appeal is the argument that it was associated with Lanmark Holdings and Lanmark Engineering based on subsection 256(2.1) of the Act.

[8] Astro Consulting submitted that the Tax Court Judge erred in applying a subjective test rather than an objective test to determine if Astro Consulting was associated with Lanmark Holdings and Lanmark Engineering. A fair reading of the Tax Court Judge's decision does not lead to this conclusion. Rather, the reason for the separate existence of the corporations as stated by Aaron Glazier (the sole witness at the Tax Court hearing) was a factor that the Tax Court Judge considered.

[9] Astro Consulting will only be associated with Lanmark Holdings and Lanmark Engineering under subsection 256(2.1) of the Act if it may reasonably be considered that one of the main reasons for their separate existence in a taxation year is to reduce the amount of taxes payable under the Act.

[10] Astro Consulting argued that having the separate corporations allowed Astro Consulting to split its income between its two shareholders by paying dividends. However, the extent to which Astro Consulting could split its income between its shareholders was not dependent on the separate corporate existence of Lanmark Holdings / Lanmark Engineering from Astro Consulting. Whether income was paid to Astro Consulting by a corporation, a partnership or an individual, it would not affect Astro Consulting's ability to pay a dividend to its shareholders from its after-tax profits.

[11] Astro Consulting also submitted that one of the main reasons for the separate existence of these corporations was to multiply the access to the small business deduction. This argument does not assist Astro Consulting, however, since there was no evidence that either Lanmark Holdings or Lanmark Engineering claimed the small business deduction in the years in issue.

[12] Based on the record, there is an inference to be drawn that the purpose of the transactions was to reduce the net income of both Lanmark Holdings and Lanmark Engineering to nil by paying for services provided by the various shareholders. This inference is confirmed by Astro Consulting in footnote 57 to paragraph 32 of its memorandum. In this footnote, Astro Consulting submits that the total profit of Lanmark Holdings and Lanmark Engineering (before any payments for the services rendered by the shareholders are deducted) would be the aggregate total amounts of income reported by the shareholders as income for services rendered to Lanmark Holdings and Lanmark Engineering. Claiming a deduction that would reduce its income to nil would mean that Lanmark Holdings and Lanmark Engineering would not pay any taxes and would not claim any small business deduction. It is therefore far from clear that one of the main reasons for the separate existence of Astro Consulting and Lanmark Holdings / Lanmark Engineering was to reduce taxes. The Tax Court Judge did not err in finding that subsection 256(2.1) of the Act did not apply.

[13] Astro Consulting also argued that the Tax Court Judge erred in finding that the amounts identified as “profit sharing” allocations made by Lanmark Holdings to Astro Consulting were payments for management services rendered by Astro Consulting. However, throughout its memorandum, Astro Consulting referred to the payments as “profit sharing” and as management

fees. For example, in paragraph 36 Astro Consulting refers to these payments as “functionally equivalent to dividends” and in the immediately following paragraph states “[i]n contrast to dividends, taxpayers may deduct reasonable management fees from their income”. In paragraph 38, Astro Consulting states “[a]s such, should Lanmark Holdings make profit sharing payments, this amount is deductible from Lanmark Holdings’s [sic] income and instead included in the recipient’s [sic] as [active business income]”.

[14] The issue in this appeal is not whether Lanmark Holdings is entitled to deduct, in computing its income, the amounts paid to its shareholders but rather whether the Tax Court Judge erred in finding that the amounts were paid as management fees.

[15] Whether Astro Consulting was being paid for providing management services to Lanmark Holdings is a question of fact. Astro Consulting reported all the amounts received from Lanmark Holdings and Lanmark Engineering in its tax returns as “consulting fees” and provided invoices to both Lanmark Holdings and Lanmark Engineering in relation to these consulting fees. Astro Consulting has not established that the Tax Court Judge made any error, let alone a palpable and overriding error, in finding that Astro Consulting was paid by Lanmark Holdings for providing management services to Lanmark Holdings.

[16] There is also no basis to differentiate between the business of providing services by Astro Consulting to Lanmark Engineering from the business of providing services by Astro Consulting to Lanmark Holdings. Therefore, there is no basis to interfere with the Tax Court Judge’s finding

that Astro Consulting was carrying on a personal services business in providing services to Lanmark Holdings.

[17] Astro Consulting also argued that the Tax Court Judge denied Astro Consulting procedural fairness in limiting its submissions during a subsequent hearing called by the Tax Court Judge. Following the hearing of the appeal, the Tax Court Judge reconvened the parties to clarify their positions in relation to the payments made by Lanmark Holdings to Astro Consulting. Given the continuing references made by Astro Consulting to these payments as "profit sharing" and management fees and the deductibility of these payments in computing the income of Lanmark Holdings, it is understandable why the Tax Court Judge would want to clarify Astro Consulting's position on the source of income for these payments. Restricting Astro Consulting's submissions in the subsequent hearing did not violate Astro Consulting's procedural fairness rights.

[18] As a result, the appeal will be dismissed with costs.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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