Docket: 2006-3534(IT)G

BETWEEN:

SANDRA GALLANT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 23, 2008, at Fredericton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant: W.S. Reid Chedore

Counsel for the Respondent: David Besler

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* in respect of the 2001 and 2002 taxation years is dismissed with costs in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 6th day of March 2009.

"François Angers"

Angers J.

Citation: 2008 TCC 91
Date: 20090306
Docket: 2006-3534(IT)G

BETWEEN:

SANDRA GALLANT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal by the appellant of reassessments for her 2001 and 2002 taxation years. The Minister of National Revenue has reassessed the appellant for unreported income of 114,365 $ for 2001 and 137,360 $ for 2002.

[2] The appellant, during both taxation years under appeal, operated two special care homes. One was located at 86 Mecklenburg Street in Saint John, New Brunswick, and was known as "Laura Manor". The other one was located at 646 George Street in Saint John, New Brunswick, and was known as "Park Place". At all relevant times, the appellant also owned a property at 45 Cedar Grove Drive in Quispamsis, New Brunswick, approximately 25 kilometres or 20 minutes' drive from Saint John (the "Cedar Grove property"). The appellant also owned a number of residential rental units in Saint. John.

[3] The appellant at all material times was licensed by the province of New Brunswick to operate the two special care homes. The operators of these special care homes provide long-term care services. When the person in need of such services is financially unable to pay the full cost thereof, the Province of New Brunswick, by virtue of the *Nursing Homes Act* and *Family Services Act*, has the ability to subsidize those services. Eligibility for the services is based on criteria set out in policies of the Department of Family and Community Services of New Brunswick. The Standard

Family Contribution Policy (the "Policy") is based on the following principles (Exhibit A-1):

- the family, as opposed to the individual, is responsible in the first instance for the full cost of non-insured services;
- the government is payer of last resort;
- and the client's obligation to pay for non-insured services takes precedence over intergenerational transfer of assets.

Other provisions of interest contained in the Policy are as follows:

6. Policy

New Brunswickers are responsible for the cost and provision of long-term care services to their family members.

Under the Long Term Care Strategy, government assists families by assessing the need for services and accessing such services. In some instances, government assists with the cost of these services when the client requiring long-term care services is financially unable to pay the full cost of these services.

The Standard Family Contribution Policy Towards Long-Term Care Services sets out the terms for determining whether a client is eligible for government subsidization of their government approved non-insured long-term care services.

Elements considered are:

- Clients with the ability to pay for their non-insured long-term care services must make a contribution towards, or in some instances, pay the full amount of services provided.
- Clients with incomes at or below basic income assistance levels will be exempt from the contribution for non-insured long-term care services.
- The amount of the client's contribution will be based on the net family income (Appendix A) and the net family assets (Appendix B) plus the family composite.

6.1. Eligibility for Subsidy

A person must be assessed as eligible for long-term care services by an authorized employee of the Department of Family and Community Services and/or the Department of Health and Wellness in order to apply for a government subsidy. The person must also be a New Brunswick resident and a Canadian citizen.

6.2. Purchased Services

Purchased services include in-home support, and services provided by special care homes, community residences and nursing homes approved by the Department of Family and Community Services.

The cost of each service provided will be used to calculate the total case plan cost for a family.

A financial subsidy is applied against the approved government rate for services such as, hourly rates, daily rates, service cost ceilings, etc. It is not available for services that are not approved by Department of Family and Community Services but which a family may choose to purchase.

. . .

6.4. Financial Responsibility

The family is responsible for the full costs of services. It is only when a financial assessment has been completed and a family contribution level assessed that subsidy may be authorized.

The family's assessed monthly contribution towards the approved services is always applied first against the service provider's monthly service costs before the government subsidy is applied. If the client does not use all of the services approved for a particular month and their monthly contribution level is more than the cost of the services used, then the client pays the total cost of services for that month.

Approved services are those services that have been assessed by an authorized employee of the Department of Family and Community Services as required to meet the client's service needs and are within the approved government rate for that service.

. . .

[4] The rate paid for long-term care services is determined by the Province of New Brunswick and is dependent on the level of care needed. Special care homes such as the ones operated by the appellant may take in only level one and level two residents. In 2001, the rate was $1,095 for level one and $2,068.33 for level two. The subsidy is paid by cheque payable to both the home operator and the beneficiary.

[5] The program described above began in 1995 and was called the residential model. As already mentioned, the program falls under the *Family Services Act* and the *Nursing Homes Act*, but it also comes under the *Mental Health Act* of

New Brunswick and is managed by that province's Department of Family and Community Services. A group of experts was asked to establish an acceptable rate of payment for home operators for each level of beneficiaries. They factored in food, lodging and staff costs as well as inflation and profit. The profit margin for operating a special care home is contingent on many factors, such as whether or not the operators have mortgages to pay or whether they live with the beneficiaries or not. Homes operated under the program are considered to be businesses, so profits are to be expected, but the amount thereof depends on how each special care home is managed.

[6] The appellant is a registered nurse with many years of experience working in hospitals and nursing homes. Around 1986, she bought the Cedar Grove property in Quispamsis and moved in with her then common-law husband and their respective children; they are now married. Each had children from a previous marriage. The property is a single-family dwelling on a lake and was used primarily as the family residence.

[7] Over the years, the appellant became more and more involved in assisting people in need and started operating special care homes. The Laura Manor property was purchased in the late eighties. It was an old three-storey boarding house in need of repairs. Around 1992, the appellant was licensed to operate the first floor of Laura Manor. A licence was eventually obtained to accommodate 15 residents in need of special or long-term care. They were residents with mental health problems or requiring long-term or palliative care; others had drug addictions. The Park Place property could accommodate 10 residents.

[8] At all relevant times, the appellant managed and worked at Laura Manor and worked a shift at Park Place; she also worked as a casual or part-time nurse.

[9] The Laura Manor property has a kitchen, a dining room and four bedrooms on the first floor, six bedrooms and an office on the second floor and eight bedrooms on the third floor. As the years went by, the appellant had to spend more and more time at Laura Manor and Park Place to help out there and to manage these homes. In the fall of 1997, she and her husband moved their clothes, books and other personal items to a room on the second floor of Laura Manor. It was a fairly large room that they used as a living area and as an office where confidential information on the residents, and also the residents' medications and/or tobacco, were kept under lock and key.

[10] The appellant testified that during the relevant years, she resided at Laura Manor with her husband. Her stepdaughter, her stepdaughter's boyfriend and their child occupied one room and her stepson occupied another. The stepson graduated from high school in June 2001. He attended Saint John Community College and became a certified special care home worker in December 2002. The appellant, her husband and family members all had their meals at Laura Manor with the residents.

[11] In the relevant years, the Cedar Grove property was gradually abandoned and was used more like a cottage. They kept the property neat, mowed the lawn and went there on weekends in both winter and summer to engage in skating and swimming activities. The Cedar Grove property was also used to store their furniture, some antiques that they had bought and other valuables that needed to be stored away from the residents at Laura Manor. No food was kept at the Cedar Grove property. Some mail was still being delivered there as it was difficult to prevent staff and residents from opening the appellant’s mail, particularly if it was cheques or other important items.

[12] The appellant was informed by her accountant in late 1999 about a provision in the *Income Tax Act* (the *Act*), namely paragraph 81(1)(*h*), that exempted income received by a taxpayer in certain circumstances. Paragraph 81(1)(*h*) reads as follows:

> 81(1) Amounts not included in income
>
> . . .
>
> (*h*) Social assistance — where the taxpayer is an individual (other than a trust), a social assistance payment (other than a prescribed payment) ordinarily made on the basis of a means, needs or income test under a program provided for by an Act of Parliament or a law of a province, to the extent that it is received directly or indirectly by the taxpayer for the benefit of another individual (other than the taxpayer's spouse or common-law partner or a person who is related to the taxpayer or to the taxpayer's spouse or common-law partner), if
>
> (i) no family allowance under the *Family Allowances Act* or any similar allowance under a law of a province that provides for payment of an allowance similar to the family allowance provided under that Act is payable in respect of the other individual for the period in respect of which the social assistance payment is made, and
> (ii) the other individual resides in the taxpayer's principal place of residence, or the taxpayer's principal place of residence is maintained for use as the residence of that other individual, throughout the period referred to in subparagraph (i).

[13] As a result, the appellant recorded separately the Laura Manor revenues received from the residents and those received from the Province of New Brunswick and she apportioned the expenses accordingly. Thus, only the revenues from the residents were declared as income and from this income was deducted the appropriate portion of the expenses. The appellant did not declare the income that came from the government program. The T2124 forms attached to the appellant's 2001 and 2002 tax returns do indicate that part of her income is exempt and that income is shown as net of related expenses.

[14] The issue is therefore whether the income or payments received by the appellant from the Province of New Brunswick are exempt income under paragraph 81(1)(*h*) of the *Act*. The respondent's position is that the nature of the payments is inconsistent with the purpose of paragraph 81(1)(*h*) of the *Act* and that this provision therefore does not apply. The respondent submits that they are not social assistance payments ordinarily made on the basis of a means, needs or income test under a program provided for by a federal or provincial law, that Laura Manor was not, during the relevant years, the appellant's principal place of residence and that the payments thus cannot be considered as exempt income.

[15] The respondent quoted this Court's decision in *Saulniers v. Minister of National Revenue*, [1997] 2 C.T.C. 3033, in support of its position. In *Saulniers*, the taxpayer operated out of a residential home a business providing care to elderly and disabled persons at a cost of $700 per person per month for board and lodging. Of the nine people to whom she provided care, seven paid with their Old Age Security benefits while the other two received social assistance. The Minister included the net earnings of $ 35,404 in 1993 and $41,975 in 1994 as taxable income earned from the operation of a business. The Court held that the exemption under paragraph 81(1)(*h*) did not apply because the paragraph is very restrictive and, while not very clear, it was not drafted so as to exempt from taxation a business which reported the above income and to prevent the application of subsection 9(1) of the *Act* which taxes such income.

[16] In another decision of this Court, namely that in *Anderson v. R.*, [2001] 4 C.T.C. 2837, Judge O'Connor addressed the issue of two first requirements of paragraph 81(1)(*h*) in these words at paragraphs 6, 7, 8 and 9:

> There are two separate requirements:
>
> (a) The payment must be social assistance, and
> (b) Payment must be made under a program provided for by a provincial law.

Both requirements raise the same issue: Did the Appellants receive a per diem because they had a statutory right to be paid or was the per diem simply consideration owed pursuant to the terms of a contract? Counsel for the Respondent has advised that the Minister has been willing to accept on an administrative basis that a non-profit organization is essentially the same as the government. Thus a payment from such an organization directly to a foster parent is the same as a payment from a government, but the Minister has never extended this treatment to payments from a for-profit entity. Reference was made to the *Income Tax Technical News No. 17*, Apr. 26, 1999. It is submitted that a person's entitlement to a social assistance or program payment is a right created by the specific statute that mandates the payment. The resulting payment is not given as consideration for any good or service. By contrast the Appellants do not have a statutory right to be paid. All they have is a contractual right to be paid and that payment is made as consideration for services rendered.

In *Storey Group Homes Ltd. v. The Minister of National Revenue*, 92 D.T.C. 1295 the Appellant was a corporation that provided foster care through houses staffed by house parents. The parents performed duties that were similar to those of these Appellants. The corporation received almost all of its income from various Children's Aid Societies. The corporation argued that the money that it received from the CAS's was a social assistance payment and was not taxable. Despite a concession on this point by the Respondent, Bonner, J.T.C.C. expressed strong reservations that such payments constituted social assistance and refused to make such a finding. His conclusion on the tax status of the payments was as follows:

> … The amounts received by the Appellant were received by it as the ordinary revenues of its business pursuant to contracts between it and the various children's aid societies. Such amounts were not, in my view, received as social assistance. ...

The decision in *Saulniers v. Her Majesty the Queen*, [1996] T.C.J. No. 1298 case also relied on a distinction between money paid as of right and money earned under a contract. The Court was of the view that paragraph 81(1)(*h*) was never intended to exempt income earned by a person running a business at a profit.

In this case the Appellants are running a business at a profit and, according to the evidence, they depend on their income from ASH to help make a living. In this way they are no different from teachers, social workers or fire fighters. [One might add the clergy, doctors and nurses.] Persons working in each of those professions render an important service to society and often do so for reasons other that [sic] the possibility of making money. Nevertheless each of those persons is taxed on their earnings because their occupation constitutes a source of income.

[17] In analyzing the means, needs or income test, Judge O'Connor wrote at paragraph 10:

> Paragraph 81(1)(*h*) requires that the payments in question be made on the basis of a means, needs or income test. Thus a person is only entitled to the payment if his means, needs or income are within the parameters set out by the legislation. In this case neither the Appellants' right to be paid, nor the quantum of payment was dependant [sic] on passing a means, needs or income test. Instead the Appellants had a contractual right to be paid a specific per diem regardless of the means, needs or income, of themselves or the children who were under the care of ASH.

[18] The appellant is licensed by the Province of New Brunswick to operate a special care home for level one and level two beneficiaries and to charge a rate determined by the province for each level. The Province of New Brunswick under its long-term care strategy assists families by assessing the need for services and providing access to such services. The Policy (Exhibit A-1) does stipulate, though, that New Brunswickers are responsible for the provision of long-term care services to their family members and for the cost thereof. Once a family member is assessed by the Province as eligible for long-term care services and if that person is unable to pay the costs of these services, he can apply for a government subsidy. A financial assessment is then conducted to determine the amount of the subsidy that will be granted to pay for the services provided by a duly licensed long-term care home. The granting of a subsidy by the Province is discretionary and the subsidy is given to a successful applicant in order to pay for the long-term care services he needs.

[19] The fact that the subsidy is payable to both the applicant and the provider of the long-term care services (as in this case) does not make the payment a social assistance payment received by the provider (here, the appellant) for the benefit of the applicant. The long-term care services are provided to beneficiaries, subsidized or not, in return for the payment of the rate set by the Province and are purely contractual in nature. The appellant is in the business of providing long-term care services and the beneficiaries purchase those services by paying the rate established by the Province. The fact that some beneficiaries have qualified for a subsidy does not change the contractual nature of the services nor does it make the subsidy a social assistance payment made to the home operator on behalf of the beneficiary.

[20] The rate is established by the Province but the appellant is the person who pays the rate regardless of where the money comes from. In my opinion, paragraph 81(1)(*h*) has no application in this fact situation and the payments are not exempt income.

[21] This conclusion is sufficient to dispose of the appeal. The evidence on the issue of whether Laura Manor was the appellant's principal place of residence in 2001 and 2002 is lengthy; I will nevertheless address that issue.

[22] The appellant's daughter and two of the appellant's husband's children confirmed that the appellant, her husband and two children all lived at Laura Manor during the relevant taxation years. Brian Gallant (the appellant's stepson) was a student and lived at Laura Manor in 2001 and 2002. He also worked at Laura Manor when he was a student and still works there. He considered Laura Manor as his parents' home. They had a large bedroom there and all their clothes were there. They had their meals at Laura Manor and slept there. Brian Gallant never lived at Cedar Grove, but he acknowledged that the appellant and her husband lived there at one point. During 2001 and 2002, the appellant and her husband did not go at Cedar Grove very often, and when they did, it was simply to check things out. He himself would go there occasionally for a swim in the summer. When he had friends over, it was at Laura Manor, and that is also where he received his telephone calls. His father would drive him to school everyday.

[23] Jonathan Gallant is also the appellant's stepson. He did not live at Laura Manor in 2001 and 2002. He had his own apartment in one of the appellant's apartment buildings and acted as caretaker of that building. He also did maintenance and repairs at Laura Manor and Park Place and mowed the lawn at Cedar Grove. He worked night shifts and did maintenance at Laura Manor on a regular basis; he confirmed that his father and the appellant lived at Laura Manor in the large bedroom and that they slept there unless the appellant was working a night shift. He confirmed that Cedar Grove was initially their home but very little time was spent there in 2001 and 2002, and when they went, it was to do upkeep.

[24] Kimberly Ernst is the appellant's daughter. She described her mother as a workaholic. In 2001 and 2002, Kimberly spent a lot of time at Laura Manor for the purpose of work and also to be with her stepsister. She described Laura Manor as a family-run business where the family members worked, and said that they considered it the family home. When her mother was away on vacation, she would stay at Laura Manor in her mother's room on the second floor. All her mother's personal items were there such as clothes, curlers, pictures, files, television and computer. Her mother's laundry was done at Laura Manor. The family had their Christmas gatherings at Laura Manor. In 2001, Kimberly kept the books, did the payroll and converted it electronically. She kept track of revenues and expenditures, as her mother had a very busy schedule.

[25] When Kimberly was in Grade 5, the family was living at Cedar Grove and all their belongings were kept there until Laura Manor was purchased. She went to Moncton for a year in the late 1990s and, upon her return, moved into an apartment one block away from Laura Manor. In 2001 and 2002, neighbours at Cedar Grove would check the place, as Kimberly's best friend lived next door. Cedar Grove was used for storage and they only went there for an occasional swim. Only confidential business was conducted at Cedar Grove and some mail went to Cedar Grove, likewise for confidentiality reasons. That mail was picked up on a weekly basis.

[26] Zarina Szezendor lives across from Laura Manor and is a friend of one of the children. She spent time at Laura Manor as an employee until 1999 and visited her friend often over the years. She believes that the appellant resided at Laura Manor in the large bedroom on the second floor and that she slept there at all relevant times. She has never heard of Cedar Grove and was not aware that the appellant may have had another house. She did notice that mail was delivered to Laura Manor.

[27] Bruce Arsenault is a friend of the family who lives about three blocks away from Laura Manor. He went to Laura Manor on a regular basis and for various reasons, one of which was playing Santa Claus at Christmas. He is a friend of the appellant’s husband and spent time with him watching television and doing a few chores around the house. In 2001 and 2002, the appellant and her husband were living at Laura Manor and occupied the second-floor room, where they slept. He confirmed that fact by saying that was where they were when he left and that was where they were the next morning when he came back to Laura Manor. He was familiar with the Cedar Grove property and went there 3 or 4 times. It was considered a summer place where they had barbecues; they also went there to do the regular upkeep. There was no food kept in the refrigerator and the place looked unlived-in and lacked fresh air.

[28] William McIllwraith lives across the street from the Cedar Grove property and three houses down. He is able to see 45 Cedar Grove. He has known the appellant and her husband for over twenty years. The appellant and her husband moved there with three children and attended the neighbourhood get-togethers and parties. In the late 1990s or early 2000s, they moved to Laura Manor in Saint John, New Brunswick. Most of the neighbours told them they were throwing their lives away. They were not around 45 Cedar Grove in 2001, 2002 and even beyond. They would show up there on odd occasions in the summertime. The driveway was often not plowed in the winter and the lawn was not mowed as often. Lights were never on at night and only a light at the front door was kept on. If he needed to call them, he would do so by calling them at Laura Manor. He would as well visit them at Laura

Manor. The appellant's husband would pick up mail at the Cedar Grove property and stop by sometimes for coffee.

[29] Bonnie Snodgrass is a former employee who started working at Laura Manor in 1998 or 1999 as a special care worker. She was uncertain as to when she actually left Laura Manor and testified that she had not worked there in 2001 and 2002; she subsequently stated that she may have left in the early months of 2001. She acknowledged that the appellant and her husband went to 45 Cedar Grove but could not say how often they went there, other than to indicate that they went when they had a break. She could not say whether, prior to 2001, the appellant slept at Laura Manor, nor was she aware if the appellant's laundry was done at Laura Manor.

[30] The audit by the Canada Revenue Agency was conducted in August 2003. Tanya McKinney was the auditor who did the audit. She visited the appellant at Laura Manor and, as they entered the premises, one elderly resident greeted the appellant by stating that she had not seen the appellant in a while. That elderly person was not called as a witness. The auditor was shown the room occupied by the appellant; she said that she did not notice anything to indicate that the appellant may have been residing there. The appellant's husband was living at 45 Cedar Grove at the time and was doing so because he was ill. The auditor also went to 45 Cedar Grove with the appellant, as this was where she kept her antiques. She noticed that the appellant had a very comfortable lifestyle.

[31] She went through the appellant's accounting and did find some anomalies, such as expenses that were claimed twice or sometimes more or tickets that were claimed as an expense but may have been used for family members. The auditor suspected that there may also have been other anomalies but could find no reliable evidence to confirm her suspicions. What she observed on her visit to the Cedar Grove property led her to believe that the appellant may have been residing at 45 Cedar Grove and that she may have committed fraud.

[32] The appellant's file was sent to the investigations unit for possible criminal charges but no charges were ever laid against the appellant. In March 2004, a CRA investigator drove to the different properties and took pictures. He drove by 45 Cedar Grove on different occasions in the spring of 2004 and noticed that cars were parked there, but that was mostly on weekends; he could not say if they were always the same cars. He did confirm that the appellant's accountant was the one who informed the appellant about section 81 of the *Act* and of its application in this instance.

[33] Finally, the evidence indicates that during the two taxation years in question, the appellant was given a residential property tax credit on the Cedar Grove property as opposed to Laura Manor, and the insurance coverage on Cedar Grove was not changed from the years preceding 2001 and 2002, although it is uncertain what type of insurance coverage was actually on the Cedar Grove property.

[34] There is no doubt that on this last issue the appellant's position is contradictory and the evidence does not provide any clear explanations as to why, other than to take advantage of the situation, the appellant would not have so informed the Province of New Brunswick if the Cedar Grove property was in fact no longer her principal residence in 2001 and 2002. The determination of one's principal place of residence for the purposes of the application of paragraph 81(1)(*h*) is dealth with in Income Tax Technical News No. 31 dated June 23, 2004, which reads as follows:

> The Cared-for individual must reside in the Caregiver's "principal place of residence", or the Caregiver's "principal place of residence" must be maintained for use as the Cared-for individual's residence, during the period for which the payment is made.
>
> An individual's "principal place of residence" is the place where the individual regularly, normally or customarily lives. In our view, the place where the individual normally sleeps is a significant factor in making this determination. Other significant factors include the location of the individual's belongings, where the individual receives his or her mail, and where the individual's immediate family, including the individual's spouse or common-law partner and children, reside.
>
> The "principal place of residence" requirement is not met in situations where the Caregiver and the cared-for individual do not share common living areas in the residence. This includes the kitchen, living room, dining room, family room and entrances to the home . . .

[35] I have reproduced a summary of the testimony of all the witnesses who were called to give evidence on this question, and although there were some contradictions and discrepancies in the various versions, I find the evidence of William McIllwraith reliable, as he is the only independent witness to corroborate the appellant's position that the Cedar Grove property was no longer the appellant's principal place of residence during the two years in question. The appellant has thus established that fact on a balance of probabilities.

[36] The appeal is dismissed with costs.

Signed at Ottawa, Canada, this 6th day of March 2009.

"François Angers"

Angers J.

CITATION:	2008 CCI 91
COURT FILE NO.:	2006-3534(IT)G
STYLE OF CAUSE:	Sandra Gallant and Her Majesty The Queen
PLACE OF HEARING:	Fredericton, New Brunswick
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APPEARANCES:

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