

TAXADVISOR

Spousal Assistants

The key is not whether you require an assistant, but whether you have to pay out of your own pocket

COURT REPORT

BY JAMIE GOLOMBEK



In my inaugural column nearly two years ago, I discussed a case in which an advisor was able to deduct the cost of hiring his wife as his assistant. A recent case, with somewhat different facts, should serve as additional ammunition should you come to blows with the Canada Revenue Agency over your ability to deduct fees paid to your spouse or partner, as your assistant.

As a quick refresher, if you're self-employed and hire an assistant, be it your spouse or an arm's length one, as long as he or she actually performs the work and is paid a reasonable salary, you should have no trouble deducting the wages you pay. The ability, however, for an employee to hire an assistant is more limited. To be able to deduct the cost of an assistant's salary, an employee must be "required" by the contract of his or her employment to pay for an assistant.

While the CRA's administrative position is that the term "required" necessitates that there be an "express requirement within the terms of a written contract of employment," it acknowledges that such a requirement can still exist if the employee can establish that it was "tacitly understood" by both the employee and the employer that the payment must be made and was necessary, under the circumstances, to fulfill the duties of the job.

A July, 2006, Tax Court of Canada decision (*Longtin v The Queen* [2006 TCC 335]) specifically dealt with the ability of a commissioned employee to deduct the salary paid to his wife. In 1997 and 1998, William Longtin was employed by Albany International Canada Inc. as a salesperson in the pulp and paper supplies business. In those years, he deducted \$26,900 and \$29,600 respectively as salary paid to an assistant, his wife Carman.

Longtin was typically on the road for four days per week and maintained an office in his home, which he was required to do as a condition of his employment. He hired his wife as his assistant and he considered her to be "an essential part of his work." He testified that he and his wife would discuss company business during the week and on Sunday nights, before he left to

go on the road. She would fax him material and telephone him while he was on the road and would have contact with the company's offices. She also kept track of expenses, paid the bills, reconciled the Visa accounts and looked after the daily organization of the office.

Carman testified that during the years in question, she would use the home office for one hour each morning and one hour each after-

noon, and continued to work sometimes late into the evening. In her estimation, she worked about 20 hours per week and had to be available when her husband called.

Albany knew that his wife was working for him and even interviewed her in addition to Longtin before he was hired. Albany would not, however, pay for the services of an assistant, the reason being, according to Longtin, the issues of

"liability and severance."

It is likely for this reason that Albany, when completing CRA Form T2200, "Declaration of Conditions of Employment," which is required to be completed by an employer for any employee attempting to deduct work-related expenses, ticked off "no" when asked if this employee was required under a contract of employment to pay for a substitute or an assistant.

The CRA focused on whether Longtin was required to have an assistant. While the judge agreed that the company may not have "required him to have the services of an assistant," the *Income Tax Act* only states that he be "required under the

contract of employment to pay his own expenses," and not whether he was required to have an assistant. There was also no need for him to show that his contract of employment required him to have an assistant. In other words, it's not the actual requirement to have an assistant but rather the requirement to pay for any assistant hired, that determines the tax deductibility. Accordingly, the judge allowed him to deduct his wife's salary. **AER**

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