

Docket: 2014-4014(IT)I

BETWEEN:

CALVIN L. LYN KEW,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 13 and 15, 2015 at Toronto, Ontario

Before: The Honourable Justice Judith Woods

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Leslie Ross

JUDGMENT

The appeal with respect to an assessment made under the *Income Tax Act* for the 2012 taxation year is dismissed. The parties shall bear their own costs.

Signed at Ottawa, Ontario this 29th day of July 2015.

“J.M. Woods”

Woods J.

Citation: 2015 TCC 193

Date: 20150729

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BETWEEN:

CALVIN L. LYN KEW,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] In 2004, Calvin Lyn Kew left Pickering, which is near Toronto, and spent the next seven years living on a sailboat. This appeal concerns a deduction claimed by Mr. Lyn Kew for expenses incurred in 2011 in sailing for 52 days from West Palm Beach, Florida to Pickering and in transporting the sailboat from Pickering to a storage area. Mr. Lyn Kew submits that the expenses are deductible as work-related moving expenses pursuant to section 62 of the *Income Tax Act*.

[2] The reassessment at issue disallowed the deduction in its entirety on the basis that the trip did not qualify as an “eligible relocation” as required by section 62.

Amount at issue

[3] The amount at issue relates to expenses incurred in 2011 that the appellant carried forward to his 2012 income tax return because he did not have sufficient income to use the deduction in 2011. The amount carried forward was \$7,325.

[4] The appellant acknowledges in the notice of appeal that there is an error in the amount claimed. The amount that should have been carried forward is \$5,936.67.

[5] The appellant also deducted \$225 for expenses incurred in 2012. I accept the submission of the respondent that this deduction was allowed by the Minister. Accordingly, this amount should not be allowed again in this appeal.

[6] At the commencement of the hearing, the appellant informed the Court that he also wished to claim an additional \$290 that he neglected to claim in the income tax return. The respondent did not object to putting this amount at issue.

[7] After the evidence had been completed, the appellant informed the Court that he wished to put a further amount in issue for meals while he lived temporarily on the sailboat in Pickering upon his return from Florida. The respondent submitted that it would be prejudiced if this amount were put at issue at this late stage. I agreed with this submission and did not allow the issue to be raised.

[8] Accordingly, the total amount at issue is the amount carried forward to the income tax return in 2012, which is \$7,325 (part of which is conceded), plus \$290.

The issues

[9] At the commencement of the hearing, there was a lengthy discussion about the issues to be decided. The appellant said that he was confused by the lack of clarity as to the reasons for the reassessment communicated to him by the Canada Revenue Agency. I also had concerns about the issues stemming from lack of clarity in the Reply.

[10] Following this discussion, I concluded that the issues that are properly engaged in this appeal are as set out below. I am satisfied that the appellant had adequate notice of these issues.

- (a) Was the “old residence” in West Palm Beach, Florida?
- (b) Was the relocation undertaken to start a business or employment at a location in Canada?
- (c) In the alternative, did expenses incurred in hauling the sailboat out of the water and transporting it to a storage area qualify as moving expenses for purposes of section 62?

[11] I would also mention for clarity that the respondent acknowledged at the commencement of the hearing that one of the Minister’s assumptions is incorrect.

The assumption had been made that the appellant had previously lived at the “new residence.” The respondent now concedes that this is incorrect, and accordingly concedes the issue stated in paragraph 14 of the Reply.

Background facts

The Voyager

[12] The appellant has Canadian and Jamaican citizenship and he has lived in Canada for many years.

[13] Prior to his sailing venture, the appellant was a long-time employee of Scotiabank. When this position was terminated, the appellant refitted an old trawler so that it was suitable for solo sailing. For seven years, from May 14, 2004 to August 27, 2011, the appellant made his home on the sailboat, which was named the Voyager. The appellant set out from Pickering in May 2004 and finally returned to Pickering with the Voyager in August 2011.

[14] It is useful to briefly set out where the appellant went over his seven years on the Voyager. The appellant was able to recreate this from a detailed ship’s log, from which he summarized his travels (Exhibit A-3).

- (a) The appellant first travelled to St. John’s, Newfoundland and Labrador where he stayed for four years while enrolled at Memorial University.
- (b) The appellant then traveled from St. John’s to West Palm Beach, Florida, where he stayed for four months.
- (c) The appellant then set out from West Palm Beach and went briefly to Miami and then on to The Bahamas. He stayed in The Bahamas for approximately eight months (from June 2009 to February 2010).
- (d) The appellant then traveled from The Bahamas to West Palm Beach where the Voyager was anchored in one location for a year near the appellant’s brother.
- (e) The appellant then set out on a cruise around the Caribbean area for four months. This trip was required to keep the appellant’s U.S. cruising permit.

- (f) The appellant then went back to West Palm Beach where he stayed briefly and then sailed back to Pickering. He arrived there in August 2011.
- (g) After two months on the Voyager while it was anchored in Pickering, the appellant moved into his mother's home, which is located at 624 Cognac Ave., Pickering. The appellant continues to reside at this address.

Business and employment

[15] The appellant has a technical background in computers.

[16] From 1988 to 2003 the appellant was employed by Scotiabank at 40 King Street West in Toronto. He was terminated when his position became redundant. The appellant's last position during that time was Senior Technical Analyst, Decision Support Services – Chief Accountants Department.

[17] Beginning March 1, 2012, the appellant commenced a six month arrangement to provide computer-related services as an independent contractor for Scotiabank. These services were provided at 20 Richmond Street East in Toronto.

[18] The appellant then became a full-time employee of Scotiabank at the Richmond Street location and is still in this employment. His current title is Manager, Strategic Information Systems & MIS, Global Transaction Banking.

Relevant legislative provisions

[19] The main applicable legislative provisions are set out below.

62.(1) Moving expenses - There may be deducted in computing a taxpayer's income for a taxation year amounts paid by the taxpayer as or on account of moving expenses incurred in respect of an eligible relocation, to the extent that [...]

[...]

62.(3) Definition of “moving expenses” - In subsection 62(1), “moving expenses” includes any expense incurred as or on account of

- (a) travel costs (including a reasonable amount expended for meals and lodging), in the course of moving the taxpayer and members of the taxpayer's household from the old residence to the new residence,
- (b) the cost to the taxpayer of transporting or storing household effects in the course of moving from the old residence to the new residence,
- (c) the cost to the taxpayer of meals and lodging near the old residence or the new residence for the taxpayer and members of the taxpayer's household for a period not exceeding 15 days,
- (d) the cost to the taxpayer of cancelling the lease by virtue of which the taxpayer was the lessee of the old residence,
- (e) the taxpayer's selling costs in respect of the sale of the old residence,
- (f) where the old residence is sold by the taxpayer or the taxpayer's spouse or common-law partner as a result of the move, the cost to the taxpayer of legal services in respect of the purchase of the new residence and of any tax, fee or duty (other than any goods and services tax or value-added tax) imposed on the transfer or registration of title to the new residence,
- (g) interest, property taxes, insurance premiums and the cost of heating and utilities in respect of the old residence, to the extent of the lesser of \$5,000 and the total of such expenses of the taxpayer for the period
 - (i) throughout which the old residence is neither ordinarily occupied by the taxpayer or by any other person who ordinarily resided with the taxpayer at the old residence immediately before the move nor rented by the taxpayer to any other person, and
 - (ii) in which reasonable efforts are made to sell the old residence, and
- (h) the cost of revising legal documents to reflect the address of the taxpayer's new residence, of replacing drivers' licenses and non-commercial vehicle permits (excluding any cost for vehicle insurance) and of connecting or disconnecting utilities,

but, for greater certainty, does not include costs (other than costs referred to in paragraph 62(3)(f) incurred by the taxpayer in respect of the acquisition of the new residence.

[...]

248.(1) Definitions - In this Act,

[...]

“eligible relocation” means a relocation of a taxpayer in respect of which the following apply:

- (a) the relocation occurs to enable the taxpayer
 - (i) to carry on a business or to be employed at a location (in section 62 and this definition referred to as “the new work location”) that is, except if the taxpayer is absent from but resident in Canada, in Canada, or
 - (ii) to be a student in full-time attendance enrolled in a program at a post-secondary level at a location of a university, college or other educational institution (in section 62 and this definition referred to as “the new work location”),
- (b) the taxpayer ordinarily resided before the relocation at a residence (in section 62 and this definition referred to as “the old residence”) and ordinarily resided after the relocation at a residence (in section 62 and this definition referred to as “the new residence”),
- (c) except if the taxpayer is absent from but resident in Canada, both the old residence and the new residence are in Canada, and
- (d) the distance between the old residence and the new work location is not less than 40 kilometres greater than the distance between the new residence and the new work location;

Discussion

[20] The deduction that is sought by the appellant requires, among other things, that there be an “eligible relocation,” as that term is defined in subsection 248(1) of the *Act*. The appellant’s position is that his relocation from West Palm Beach to Pickering satisfies each of the requirements of this provision, as described below.

[21] With respect to paragraph (a) of the definition of “eligible relocation,” the appellant submits that the purpose of the relocation was to, among other things, carry on a business at his mother’s residence.

[22] With reference to paragraph (b), the appellant submits that: (1) before the relocation he was an ordinary resident of West Palm Beach, specifically at the location where the *Voyager* was anchored, and (2) after the relocation he was an ordinary resident at his mother’s home in Pickering.

[23] With reference to paragraph (c), the appellant submits that the old residence does not need to be in Canada because he was absent from but resident in Canada.

[24] As for paragraph (d), the appellant submits that the new residence is more than 40 kilometres closer to his new work location than his old residence.

[25] The difficulty that I have with the appellant's position is that I am not satisfied that the relocation occurred to enable the appellant to carry on a business at his mother's residence.

[26] I would first comment on the approach that should be taken in determining the appellant's purpose for the relocation. Although a taxpayer's statement of purpose is relevant, this statement is self-serving and not determinative. Objective factors are also important.

[27] I note the following comment of Iacobucci J. in *Symes v. The Queen*, 94 DTC 6001 (S.C.C.), at p. 6014:

As in other areas of law where purpose or intention behind actions is to be ascertained, it must not be supposed that in responding to this question, courts will be guided only by a taxpayer's statements, *ex post facto* or otherwise, as to the subjective purpose of a particular expenditure. Courts will, instead, look for objective manifestations of purpose, and purpose is ultimately a question of fact to be decided with due regard for all of the circumstances. [...]

[28] In this case, I find that, prior to the relocation, the appellant had a general plan to look for work in the Toronto/Pickering area. The plan included contacting Scotiabank, which was his former employer, as well as looking for other business opportunities.

[29] The appellant ended up accepting a contract with Scotiabank and he commenced work about six months after his return to Canada. The evidence does not reveal how this contract transpired, but the contract was entered into before the appellant pursued other potential work opportunities.

[30] According to the appellant's testimony, which I accept, the appellant always planned to come back to Canada at some point, and he did not have the necessary visa to work in the United States.

[31] I also accept the appellant's testimony that his return to Canada was hastened by a renewed relationship with his children and that living at his mother's residence made economic sense since he had limited funds.

[32] The evidence as a whole does not satisfy me that the appellant's relocation to Pickering occurred to enable him to start a business at his mother's residence.

[33] Before the relocation, the appellant had only had a general plan to look for work in the Toronto/Pickering area. It only makes sense that the appellant would be open to the best work opportunity that came his way. I find that the appellant did not have a specific intent to commence a business at his mother's residence.

[34] This conclusion is supported by an excerpt from an email titled "What's Up?" sent by the appellant to an acquaintance on July 4, 2011 (Ex. A-1, Tab 10). At the time, the appellant was enroute from Florida to Pickering.

I want a job too, so I can make some money to help my kids, even though they are grown up and can help themselves much. But I am fifty five and I don't know who will hire me at my age. Do you have any ideas how I can earn money? Is it too late for me to start a business of my own, do you think? I've never been in business for myself before but I think I would do well if I find a good business to get into. Any ideas?

[35] This email demonstrates that the appellant wanted to find work but that he had not formulated a specific work plan at the time he left Florida.

[36] I conclude that the relocation did not occur to enable the appellant to commence a business at his mother's residence and that the expenses were not incurred in respect of an "eligible relocation."

[37] In light of this conclusion it is not necessary that I consider the other issues in this appeal and I decline to do so.

Conclusion and costs

[38] The appeal will be dismissed.

[39] As for costs, the appellant seeks an award of costs for the inordinate amount of time that he spent preparing for this appeal due to Canada Revenue Agency's poor communication in describing the reasons for the reassessment.

[40] In an appeal in this Court, there must be exceptional circumstances to justify an award of costs to the losing party. This is not such a case.

[41] The problem with the appellant's position is that the prior communications by the Canada Revenue Agency are not relevant in determining the issues in the appeal. The issues for purposes of the appeal, from the respondent's perspective, are set out in the Reply. It is the function of the Reply to inform the taxpayer of the case that he has to meet in Court.

[42] It is unfortunate if the prior communications were not clear, but it is not appropriate to deviate from the usual rule as to costs.

[43] Accordingly, each party shall bear their own costs.

Signed at Ottawa, Ontario this 29th day of July 2015.

“J.M. Woods”

Woods J.

CITATION: 2015 TCC 193

COURT FILE NO.: 2014-4014(IT)I

STYLE OF CAUSE: CALVIN L. LYN KEW and HER
MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: July 13 and 15, 2015

REASONS FOR JUDGMENT BY: The Honourable Justice Judith Woods

DATE OF JUDGMENT: July 29, 2015

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Leslie Ross

COUNSEL OF RECORD:

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