Docket: 2016-2774(IT)I

BETWEEN:

MARIJA BOBIC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 21, 2017, at Hamilton, Ontario.

Before: The Honourable Justice Gaston Jorré

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Gregory B. King

JUDGMENT

For the attached reasons for judgment, the appeal from the assessments made under the *Income Tax Act* (the "*Act*") for the 2008 and 2009 taxation years is allowed, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

1. With respect to the 2008 taxation year, the Appellant is to be allowed an amount of $400 in employment expenses and the gross negligence penalty pursuant to subsection 163(2) of the *Act* is to be adjusted to take account of that change;

2. With respect to the 2009 taxation year:

    a. The Appellant's net trucking income must be reduced by $12,165 and, in addition,

b. The Appellant may, with respect to the truck, deduct an amount of capital cost allowance not exceeding the maximum amount permissible in accordance with the *Act* and the *Income Tax Regulations*. **The Appellant shall advise the Minister, within two months of the date of this judgment, what amount, if any, of capital cost allowance she wishes to claim.**

c. The amount of the gross negligence penalty pursuant to subsection 163(2) of the *Act* is to be adjusted to take account of the reduction in the trucking income as a result of a. and b.

Signed at Ottawa, Ontario, this 8th day of June 2017.

"Gaston Jorré"

Jorré J.

Citation: 2017 TCC 107
Date: 20170621
Docket: 2016-2774(IT)I

BETWEEN:

MARIJA BOBIC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

[These amended reasons for judgment are issued in substitution for the reasons for judgment signed on June 8, 2017 and to remove a word from the first line of paragraph 12.]

Jorré J.

[1] The Appellant appeals from reassessments of her 2008 and 2009 taxation years.

[2] In reassessing:

i. With respect to the 2008 taxation year, the Minister

a. disallowed all $12,136.40 of employment expenses claimed,

b. disallowed the $2,419 of administrative fees and safety deposit box fees claimed against investment income and

c. levied gross negligence penalties of $638.60 pursuant to subsection 163(2) of the *Income Tax Act*[1] (the "*Act*") in respect of the disallowed amounts in a. and b.

[1] R.S.C. 1985, c. 1, (5th Supp.).

ii. With respect to the 2009 taxation year, the Minister

a. added to the Appellant's income unemployment insurance benefits in the amount of $17,501,

b. disallowed the rental loss of $4,701.08 claimed (i.e. the Minister treated the Appellant as not having a rental income source),

c. disallowed all expenses claimed with respect to a trucking business and

d. levied gross negligence penalties of $682.50 pursuant to subsection 163(2) of the *Act* in respect of the disallowed amounts in b. and c.[2]

[3] The issues in this case are primarily questions of fact and I will deal in turn with each of the changes made by the Minister.

2008 Tax Year

[4] In 2008 the Appellant worked as a server at a restaurant in a hotel; she also worked occasionally off-site because her employer did catering off-site. The employer was a company. According to the record of employment filed the period of employment was from 1 January 2008 to 29 November 2008.[3]

[5] Her income tax return for the 2008 taxation year showed employment income of $26,868.48. As a result of claiming various deductions she filed a return showing no federal or Ontario tax payable and resulting in a refund of all tax withheld as well as a refundable working income tax benefit of just over $1,000.

Administrative and Safety Deposit Box Fees

[6] With respect to the $2,419 of administrative fees and safety deposit box fees claimed against investment income, the Appellant did not really know what the fees were about. She thought the administrative fees might be what she paid the

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2 Based on the reply to notice of appeal, no penalty was levied with respect to the omitted amount of unemployment insurance benefits.

3 The record of employment is in Exhibit A-1.

man who prepared her tax return and, as for the safety deposit box she stated that she kept her passport in it. The Appellant had no investment income and did not have any investments. Accordingly there is no basis for those claimed deductions.

Employment Expenses

[7] Under subsection 8(2) of the *Act* employees are limited to deducting only those expenses that are permitted by section 8. Subsection 8(1) states:

> In computing a taxpayer's income for a taxation year from an office or employment, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto:

[8] The only provisions that might have application here are paragraphs 8(1)(*h*), (*h.1*), (*i*) or (*j*) of the *Act*; subsections 8(4) and (10) are also relevant.[4]

[9] Turning to the employment income, the Appellant claimed the following employment expenses:

[4] Under subsection 8(10) a form T2200, declaration of conditions of employment, from the employer is a precondition to any deduction under paragraphs 8(1)(*h*), (*h.1*) or (*i*); it is indirectly a precondition to any deduction under paragraph 8(1)(*j*) since, in our circumstances here, 8(1)(*j*) can only come into play if the Appellant is eligible to claim a deduction under 8(1)(*h*) or (*h.1*). In this case, as the Respondent pointed out, a T2200 was not provided until 2016; it was dated 2016-01-11 and signed by the Appellant's brother-in-law who is, according to the form, owner of the company. Unlike the Record of Employment, it states that the Appellant worked until the 31st of December. The form states that the Appellant was responsible for her own motor vehicle expenses, cell phone and uniforms; I note that the form is not conclusive as to the deductibility of the expenses. Finally, I note that while subsection 8(10) requires that the form be filed with the tax return the form itself says: "The **employee** does not have to file this form with his or her return, but must keep it in case we ask to see it." This is true of both the 2008 version of the form and the 2016 version.

Entertainment	$ 430.00
Legal, accounting & professional fees	$ 500.00
Maintenance & repairs	$ 239.70
Meals	$ 499.30
Memberships & subscriptions	$ 132.00
Office expenses	$ 250.00
Supplies	$ 247.80
Telecommunications	$ 1,458.30
Tools	$ 263.70
Travel (4,950 km @ $0.52)	$ 2,574.00
Uniforms	$ 1,887.60
Vehicles	
Gasoline & oil	$ 1,180.00
Insurance & licences	$ 1,374.00
Parking & tolls	$ 550.00
Repairs & maintenance	$ 550.00
Total	$12,136.40

[10] The Statement of Employment Expenses attached to the return is headed "Cleaners" which is odd although the Appellant testified that, when there are no customers around to serve, she might clean the bar.

[11] There are a number of problems with the expenses claimed and, except to a very minor extent, I am satisfied that the Minister was correct in denying the expenses.

[12] First, I will turn to the car expenses; they include not only gasoline and oil, insurance and licences, parking and tolls and repairs and maintenance but also the travel expenses claimed at $0.52 per kilometre. Together these car expenses represent slightly over one half of the employment expenses claimed.

[13] I note that one cannot claim both the deductible portion of actual expenses for things such as gasoline and also claim an amount per deductible kilometre. This is double counting; a claim for an amount per deductible kilometre is a rough and ready proxy for the deductible portion of actual costs.

[14] However, the first question is whether the Appellant has any deductible car expenses at all. The cost of getting to work is not normally deductible. However,

where the taxpayer is ". . . ordinarily required to carry on the duties of the . . . employment away from the employer's place of business or in different places" then ". . . expenses incurred for travelling in the course of the . . . employment" (emphasis added) will be deductible.

[15] The evidence was that most of the Appellant's work was done at her employer's restaurant. Sometimes she worked at a different location where her employer was catering the event.

[16] Although the Appellant had a long commute to her employer's restaurant, about 300 km round trip, it is well settled that the costs of travelling to an employee's place of work are not deductible. That would cover the bulk of the claimed car expenses whatever the proper quantum is.

[17] Going to work at the locations other than the restaurant where her employer was catering an event for a client and which do not constitute a regular place of employment might be deductible; unfortunately, the Appellant did not keep a log book and the evidence does not enable me to determine how many times the Appellant went to work at such locations, where they were or what distances the Appellant may have travelled to get to such locations.[5]

[18] As a result, while I accept that, on occasion, the Appellant performed work at locations other than the restaurant and there may be a modest amount of allowable car expenditures, there is little basis upon which I could recognize them. In the circumstances, I will allow a very modest amount of car expenditures to recognize that there were some such expenditures, which amount I set at $400.

[19] A large amount was claimed for uniforms but the evidence did not demonstrate that the restaurant required a uniform. Based on the testimony and the receipts in evidence the expenditures appear to have simply been to purchase clothing. The law is quite clear that normal clothing worn to work is not deductible.

[20] The Appellant said that on some occasions where they were serving at a themed occasion they had to wear a costume and gave two or three examples. That might have raised an interesting question but given that the Appellant did not point

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[5] I also note that the Appellant filed limited and unorganized documentary backup for the claimed car expenses with the result that, not only am I not satisfied that a specific number of allowable kilometres have been shown, I am also not satisfied that the Appellant has demonstrated more than a part of the expenditures were incurred, whether or not they are deductible.

to any specific amount expended, there is no basis on which I could find that there should be any amount allowed in respect of a costume.

[21] The amount for telecommunications appears to be for a mobile phone.[6] The Appellant needed this so she could be readily reached if, for example, the restaurant wanted to call her in and also to find locations through the Internet. These appear to be a rather incidental use of the phone. Perhaps a portion of the monthly cost of the phone might fall within "supplies consumed" in subparagraph 8(1)(*i*)(iii) if the evidence had shown some incremental costs from the work-related uses.[7] There was no such evidence.

[22] There is no reason to allow any amount for telecommunications.

[23] Meals are not generally deductible except as part of a travel expense and in such a case the requirements of subsection 8(4) of the *Act* must be met. The subsection says:

> An amount expended in respect of a meal consumed by a taxpayer who is an . . . employee shall not be included in computing the amount of a deduction under paragraph (1)(*f*) or (*h*) unless the meal was consumed during a period while the taxpayer was required by the taxpayer's duties to be away, for a period of not less than twelve hours, from the municipality where the employer's establishment to which the taxpayer ordinarily reported for work was located and away from the metropolitan area, if there is one, where it was located.
>
> [Emphasis added]

[24] There is simply nothing in the evidence that shows that the conditions of the section are met.[8]

[25] Finally, with respect to the remaining amounts claimed for entertainment, legal, accounting and professional fees, maintenance and repairs, memberships and subscriptions, office expenses, supplies and tools, there is no basis for these claims: for much of the amounts claimed I am not convinced of the existence of the expenditures, for example the claimed entertainment expenses or membership and subscription expenses; equally important, to the extent there might be such

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6 Transcript, page 88.

7 Or if it had shown that the work-related portion represented a quite significant part of the use resulting in expenses that would not otherwise have been incurred. However, that was not the case; indeed, the only phone bill for 2008, located in Exhibit A-1, was dated March 4, 2008, and appears to be for a home telephone line.

8 It is as a result unnecessary for me to go into the many problems with the copies of the receipts provided in support of this claim and other employment expenses claimed.

expenditures incurred I am not convinced that the evidence shows any reason to think that they were "amounts as are wholly applicable" to the Appellant's income as a restaurant server or that any part of the expenditure "may reasonably be regarded as applicable" to the Appellant's income as a restaurant server as required by the opening paragraph of subsection 8(1).[9]

2008 Penalties

[26] Penalties pursuant to subsection 163(2) were levied with respect to the disallowed amounts. The subsection says, in part:

> Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return . . . filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of $100 and 50% of the total of
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> . . .

[27] There are two key elements to the penalty: first, there must be a false statement and, second, the person must make or assent to the statement knowingly or circumstances amounting to gross negligence.

[28] There is no question that there are false statements.

[29] As to the question of gross negligence, it must be remembered that gross negligence includes wilful blindness.[10]

[30] The Appellant takes the position she knows little about tax and relied on the person who was recommended to her and who prepared her returns.

[31] While individuals are not expected to be tax experts, relying on someone else does not relieve a person from making reasonable efforts in the circumstances to insure the accuracy of their tax return.

[32] I am not satisfied that the Appellant made such efforts. There are a number of red flags that should have led the Appellant to question the return prepared for

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[9] I would note that with respect to tools, maintenance and repairs there was some evidence that related to car expenditures that fit into these headings but nothing that suggested some other deductible expenditure. I have already dealt with car expenditures above.

[10] See *Panini v. Canada*, 2006 FCA 224 (CanLII).

her and take action. The following are examples of items that should unquestionably have raised questions in the mind of the Appellant: claiming administrative fees and safety deposit box fees against non-existent investment income when she had no investments, claiming entertainment expenses or claiming memberships and subscriptions. More generally, the high level of expenses claimed relative to her income ought to have provoked questions.

[33] The only reasonable explanation for this failure to see these "red flags" is wilful blindness. Accordingly, the penalty is justified and should be maintained except for an adjustment to the amount of the penalty to take account of $400 in car expenses allowed.

2009

[34] The Appellant filed a 2009 income tax return showing no federal tax payable and no Ontario tax payable. It did calculate that she had $389 in CPP premiums to pay.

Employment Insurance Benefits

[35] The Minister added to the Appellant's income unemployment insurance benefits in the amount of $17,501 that were not included in her tax return. No penalties were levied with respect to this amount and this change is not contested.

The Rental Loss

[36] The Appellant reported gross rental income of $4,800 and claimed the following expenses:

Insurance	$ 655.00
Interest	$2,144.85
Maintenance & repairs	$ 877.00
Motor vehicle expenses	$2,485.00
Office expense	$ 125.00
Legal, accounting & professional fees	$ 550.00
Utilities	$1,337.31
Other expenses[11]	$1,326.92

[37] These expenses total $9,501.08 for a reported net rental loss of $4,701.

[38] The Minister treated the Appellant as not having a source of rental income and simply disallowed the loss of $4,701.[12] In the alternative, the Minister challenged the expenses.

[39] The Appellant's condo had two floors and her testimony was that she rented the second floor for the last five or six months of the year to three foreign students for $400 (or $380) a month to each student. She did this out of necessity because her husband was going bankrupt at the time.

[40] While at the start of the year the upstairs was undivided she and her husband built walls so as to create three separate rooms for the students. There was only one bedroom downstairs for her family which consisted of the Appellant and her husband, twins who were about two years old and an infant who was recently born. The Appellant said the family could manage this crowding given that, as a long-distance truck driver, her husband was away much of the time.

[41] For five months of rental this should have produced about $6,000 in rent but only $4,800 was reported. The Appellant explained this by the fact that the three students could not always pay and because they were good tenants she accepted what they could pay.

[42] Given the difficulties she and her husband faced I find this evidence hard to accept.

[43] There is a more important reason why I cannot accept the Appellant's evidence regarding the rentals. She said quite clearly that because her husband was

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[11] Within these other expenses was an amount of $280 for entertainment.

[12] As opposed to disallowing the expenses and creating taxable income.

away she only wanted to rent to female students and did indeed rent to female students.

[44] Her evidence on this and certain other matters relating to the rental is flatly contradicted by a letter dated January 16, 2016 that she sent to the CRA where she says:

> My renters for the year were Mr. Chen, Ye Tse, and Mr. Hwang, Ji Yu. They were students from China. They took up residence in July and left December 31, 2009. They paid $400 per month each, in cash. Total rent was $4,800.[13]

[45] The Appellant explained the contradictions by the fact that her tax preparer had drafted the letter. I do not accept the explanation: the Appellant sent the letter and, while English is not her first language I have no doubt that she would have understood what I just quoted. I also note the discrepancy between two tenants and three tenants.

[46] As a result I do not accept the Appellant's testimony about the rentals with the consequence that I have not been convinced that part of the house was rented out. Accordingly, there was no rental source and the Minister was justified in denying the loss claimed.[14]

[47] Accordingly there is no reason to change this aspect of the reassessment.

The Trucking Business

[48] The Appellant's husband was a long-distance truck driver. He went bankrupt and in 2009 the Appellant bought a truck and went into the trucking business in order for her husband to be employed driving the truck she bought. Based on the Bill of Sale the truck was purchased in August and, based on the owner operator pay statements from the Rosedale Group the truck started earning revenue at the beginning of September.

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[13] The letter is part of Exhibit R-4; see point 2 in the middle of the first page.

[14] It is therefore unnecessary to deal with the claimed expenses. I would just note that there are many difficulties with the claimed expenses even if there were a source. For example, even if there were a rental source, on the evidence it is hard to conceive how there would be $2,485.00 in related motor car expenses; indeed, when asked about this the Appellant seemed to think that these might be car expenses of her husband that she had to pay because he was going bankrupt - see page 126 of the transcript. Another example is with respect to the amount of $2,144.85 interest claimed; when asked about this the Appellant was not sure what it was but stated that it probably came from the credit card – see page 119 of the transcript. Nothing in the evidence suggests how the credit card interest could relate to a rental, if there was one. Those two items of expenses above total $4,629.85, almost as much as the loss of $4,701.00 claimed.

[49] The Appellant's tax return showed sales of $38,565. It also showed a subcontract of $9,109 and various other expenses totalling $22,027.45 leaving a net income of $7,428.55.

[50] In assessing, the Minister accepted the gross revenue but denied all the expenses. It is of course hard to imagine a business without expenses.[15]

[51] At the hearing, the Appellant filed a variety of documents but does not appear to have kept any sort of conventional accounting records with respect to the trucking business. The most useful documents were the owner operator pay statements. I will come back to them in a moment. The Appellant also brought a jumble of receipts many of which are not relevant to the trucking business.[16]

[52] Portions of the owner operator pay statements are not always legible. From those statements it would appear that Rosedale paid the Appellant an amount of about $53,400 for trucking services. This amount appears to include an amount of approximately $7,000 in fuel rebates. The statements also show deductions of approximately $24,500 from the payments; these deductions appear to be for expenses paid by Rosedale on behalf of the Appellant, primarily for fuel.

[53] I wish to take a moment and recognize the efforts by counsel for the Respondent, Mr. King, during the hearing in going through the documents, many or most of which he had not seen before, and conceding a number of expenses. The concessions included the above-mentioned deductions on the owner operator statements and additional amounts totalling about $1,750 for a total of about $26,250, a total greater than the $22,027.45 amount of expenses claimed in the tax return, not counting the claimed $9,109 expense for a subcontract. Counsel, in effect, qualified his concessions stating that they were made on the basis that if the deductions shown by Rosedale were accepted so must the gross revenues earned by the Appellant as shown on the same statements. I agree. The result still leads to a reduction in the net income from trucking and as a consequence the income tax assessed.[17]

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15 Unless the customer payments are net of all costs; that is not the case here.

16 For example, there are receipts from Walmart, Metro, Wendy's, the LCBO and the Beer store. In the case of the LCBO and the Beer store, the Appellant's testimony was that these receipts were in order to buy Christmas gifts for dispatchers at the trucking company and were therefore a business expense. I do not accept that testimony given that in the statement of expenses no amounts were claimed for entertainment or for advertising.

17 There is thus no violation of the principle that this Court cannot increase the amount of tax assessed. No objection was taken to the entry of the owner operator pay statements and I have no reason to doubt the veracity of the statements prepared by a third party. If I accept the veracity of the statements I cannot ignore the

[54] Are there any other valid expenses for this business? The Appellant claimed $9,109 expense for a subcontract. She said this was the amount she paid her husband to drive the truck and was paid in cash. I do not accept her evidence on this for three reasons. First, it is odd to classify such an amount as a subcontract as opposed to wages in Part 5 of the Statement of Business Activities in the tax return. Secondly, this amount is inconsistent with two statements she prepared that purportedly show amounts paid to her husband in the four months September to December 2009 inclusive; according to these statements, over $13,600 was paid to her husband.[18] Third, I am unable to conceive how she could have paid her husband $9,109, or over $13,600, and yet show her husband's net income as $902.48 on the first page of her tax return.[19] As a result I do not accept that there was such an expense.

[55] The major cost shown on her tax return is some $19,000 in motor vehicle costs; this amount is more than covered by the $26,250 conceded by the Respondent. There is no need to make any further allowance for motor vehicle costs save for capital cost allowance.

[56] The Appellant bought a used truck in 2009 for $52,950 exclusive of GST[20] and no amount was claimed for capital cost allowance in the return. The Respondent concedes that the Appellant should be allowed to claim capital cost allowance on the truck if she so chooses. The judgment will reflect this.

[57] The Appellant also claimed various smaller amounts for interest, supplies, legal, accounting and other professional fees as well as for telephone and utilities; these amounts totalled a little less than $2,950. Although there were no doubt some amounts of other miscellaneous expenses, there was no explanation of these amounts. For example, it was not explained what interest, paid to who, was paid in relation to the business. There are some phone and utility bills that are in the receipts but no testimony to explain what is linked to the business and how the

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revenues shown. Further, the Appellant, having introduced the statements, could not object that she was taken by surprise.

I also note that I am using round numbers because the evidence does not lend itself to exact numbers. The additional amounts totalling about $1,750 are conceded at pages 138, 154, 161, 162, 164, 167, 168, 169, 185, 196 and 199 of the transcript.

[18] These two statements are in Exhibit A-4; at the top right of the statements the words "Driver Statements" are printed by hand.

[19] See Exhibit R-5.

[20] See the Bill of Sale in Exhibit A-4.

allocation was done.[21] In the circumstances, it is appropriate to recognize a small amount of $750 in other expenses.

[58] I have not been satisfied that the Appellant is entitled to any other expenses in relation to the trucking business.

[59] Consequently, with $53,400 in revenues and $27,000 in trucking expenses, the Appellant has a net income from trucking of $26,400 before any claim for capital cost allowance.

[60] Since the Minister assessed on the basis of a net trucking income of $38,565, the consequence is that the Appellant's trucking income must be reduced by $12,165. In addition, the Appellant may deduct an amount of capital cost allowance not exceeding the maximum amount permissible in 2009 with respect to the truck. The Appellant will have to advise the Minister what amount of capital cost allowance she wishes to claim.

2009 Penalties

[61] Finally, I come to the gross negligence penalties levied by the Minister in 2009. There is no question that there are false statements in the return. I am also satisfied that the Appellant had to have, at the least, been wilfully blind to think that, in the circumstances, there could be a rental loss and that the net income of the trucking company was $7,428.55 or that its gross revenue was about $38,000.[22]

[62] Accordingly the Minister is justified in applying a gross negligence penalty in 2009.[23]

Conclusion

[63] For the above reasons a limited number of changes are to be made to the assessments of 2008 and 2009. Accordingly, the appeal is allowed and the matter is referred back to the Minister for reconsideration and reassessment on the basis that:

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[21] Some expenses not shown in the return were also claimed but again there is little basis to reach a conclusion that there are some specific deductible amounts.

[22] Just with respect to revenues, on a cash flow basis as opposed to an accrual basis, the trucking business received about $48,000.

[23] As previously noted, no penalty was applied in respect of the unreported employment insurance benefits.

1. With respect to the 2008 taxation year, the Appellant is to be allowed an amount of $400 in employment expenses and the gross negligence penalty pursuant to subsection 163(2) of the *Act* is to be adjusted to take account of that change;

2. With respect to the 2009 taxation year:

    a. The Appellant's net trucking income must be reduced by $12,165 and, in addition,

    b. The Appellant may, with respect to the truck, deduct an amount of capital cost allowance not exceeding the maximum amount permissible in accordance with the *Act* and the *Income Tax Regulations*. The Appellant shall advise the Minister, within two months of the date of this judgment, what amount, if any, of capital cost allowance she wishes to claim.

    c. The amount of the gross negligence penalty pursuant to subsection 163(2) of the *Act* is to be adjusted to take account of the reduction in the trucking income as a result of a. and b.

Signed at Ottawa, Ontario, this 21st day of June 2017.

"Gaston Jorré"

Jorré J.

CITATION:	2017 TCC 107
COURT FILE NO.:	2016-2774(IT)I
STYLE OF CAUSE:	MARIJA BOBIC v. THE QUEEN
PLACE OF HEARING:	Hamilton, Ontario
DATE OF HEARING:	February 21, 2017
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REASONS FOR JUDGMENT BY:	The Honourable Justice Gaston Jorré
DATE OF JUDGMENT:	June 8, 2017
DATE OF AMENDED REASONS FOR JUDGMENT:	June 21, 2017

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Gregory B. King

COUNSEL OF RECORD:

For the Appellant:	
Firm:	
For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada