

Docket: 2005-13(IT)I

BETWEEN:

MYRON ROZUMIAK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 16, 2005, at Vancouver, British Columbia

Before: The Honourable Justice D.W. Beaubier

Appearances:

Agent for the Appellant: Stuart Crown

Counsel for the Respondent: John Gibb-Carsley and
Kevin MacGillvary, Articling Student

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2002 taxation year is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

The Appellant is awarded his taxable costs respecting the appeal.

Signed at Saskatoon, Saskatchewan, this 28th day of December 2005.

"D.W. Beaubier"

Beaubier, J.

Citation: 2005TCC811
Date: 20051228
Docket: 2005-13(IT)I

BETWEEN:

MYRON ROZUMIAK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Beaubier, J.

[1] This appeal pursuant to the Informal Procedure was heard at Vancouver, British Columbia on December 16, 2005. The Appellant testified and called his former supervisor, Scott Galloway, his daughter, Tanya Carter, and his wife, Dianne.

[2] The assessment arises from the Appellant's employment under a written contract with the Vancouver Port Authority ("VPA") commencing in 2002. The particulars in dispute are set out in paragraphs 12-19 of the Reply to the Notice of Appeal. They read:

12. In the Notice of Objection the Appellant requested that he be entitled to include medical premiums, paid on Appellant's behalf by VPA, of \$9,585 to the 2002 taxation year in the calculation of non-refundable tax credits.
13. In response to the Notice of Objection the Minister reassessed the Appellant, and issued a Notice of Reassessment, on 12th October 2004, allowing vehicle expenses of \$3,165 and, including in the calculation of gross non-refundable tax credits, \$9,585 for the medical premiums paid on the Appellant's behalf by VPA..

14. In so reassessing the Appellant on 12th October 2004, the Minister relied on the following assumptions:

- a) in 2002 the Appellant received employment income from Canadian National Railways of \$288.00;
- b) in 2002 the Appellant received other employment income from Canadian National Railways of \$288.00 on account of medical insurance premiums;
- c) in 2002 the Appellant received other employment income from Canadian National Railways of \$105.84 on account of life insurance premiums;
- d) on 1st November 2001 the Appellant and VPA signed an agreement (the "Agreement") which provided that the Appellant would perform the duties of the Manager, Trade and Development (U.S.) Midwest Office ("Chicago Office") of VPA;
- e) the Agreement was for the period from 12th November 2001 to 11th November 2004;
- f) the Appellant took up his duties in Chicago in April 2002;
- g) under the terms of the Agreement, VPA expected the Appellant to remain and reside in Chicago from April 2002 to November 2004;
- h) the Appellant received \$120,898.00 from VPA in his 2002 taxation year;

Vehicle expenses:

- i) in the 2002 taxation year the Appellant received a vehicle allowance of \$4,572;
- j) in the 2002 taxation year the Appellant was entitled to deduct the business portion of his total vehicle expenses in the amount of \$3,165.31;

Medical premiums

- k) VPA paid medical insurance premiums of \$9,585 on the Appellant's behalf for 2002 taxation year;
- l) \$9,585 is allowable in the calculation of the Appellant's non refundable tax credits for the 2002 taxation year;

Other amounts:

- m) the rental expenses of \$20,410.00 paid by VPA on the Appellant's behalf in 2002 were personal expenses of the Appellant; and
- n) the utilities, parking and telephone expenses of \$9,414 paid by VPA on the Appellant's behalf in 2002 were personal expenses of the Appellant.

B. ISSUES TO BE DECIDED

- 15. The issue are:
 - a) whether the Appellant is entitled to deduct rental expenses of \$24,100 under the provisions of 6(6) of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.), as amended (the "*Act*"); and
 - b) whether the Appellant is entitled to utilities, parking and telephone expenses of \$9,414 under the provisions of 6(6) of the *Act*.

C. STATUTORY PROVISIONS RELIED ON

- 16. He relies on section 3, 5, 6, 8, 248, and paragraphs 18(1)(h), of the *Act*.

D. GROUNDS RELIED ON AND RELIEF SOUGHT

- 17. He respectfully submits that the Appellant is not entitled to deduct from his 2002 income from VPA rental expenses of \$24,100 or the rental, utilities, parking and telephone of \$9,414 that were paid on the Appellant's behalf by VPA because the duties performed for VPA in Chicago by the Appellant were not of a temporary nature pursuant to subsection 6(6) of the *Act*.
- 18. He further submits that the Minister properly included the rental expenses of \$24,100, and the \$9,414, of utilities,

parking and telephone expenses, paid by VPA on the Appellant's behalf, pursuant to sections 3, 5 and 6, of the *Act*.

19. He further submits that the Minister properly included the rental expenses of \$24,100, and the \$9,414, of utilities, parking and telephone expenses, paid by VPA on the Appellant's behalf, were personal expenses of the Appellant and are not deductible under the provisions of section 8 of the *Act*.

[3] Assumptions 14 (a) to (l) inclusive were not refuted. Assumptions 14 (m) and (n) are in dispute.

[4] The question is whether the amounts described in assumptions 14 (m) and (n) are excluded from the Appellant's income pursuant to subsection 6(6) of the *Income Tax Act* ("Act") which reads:

(6) Notwithstanding subsection 6(1), in computing the income of a taxpayer for a taxation year from an office or employment, there shall not be included any amount received or enjoyed by the taxpayer in respect of, in the course or by virtue of the office or employment that is the value of, or an allowance (not in excess of a reasonable amount) in respect of expenses the taxpayer has incurred for,

(a) the taxpayer's board and lodging for a period at

(i) a special work site, being a location at which the duties performed by the taxpayer were of a temporary nature, if the taxpayer maintained at another location a self-contained domestic establishment as the taxpayer's principal place of residence

(A) that was, throughout the period, available for the taxpayer's occupancy and not rented by the taxpayer to any other person, and

(B) to which, by reason of distance, the taxpayer could not reasonably be expected to have returned daily from the special work site, or ...

[5] Mr. Galloway testified that the Appellant was hired and sent to Chicago by VPA because VPA wanted a Canadian to open an office for VPA there who would devote all of his time to inquiring into and soliciting business for VPA to bring it into the Port of Vancouver, and ship by rail to or through Chicago a gateway to a major United States market. It was an experiment to see what the landscape looked

like, in Mr. Galloway's words. At his hiring, Mr. Rozumiak had 29 years experience across Canada and in the Port Area of Vancouver with goods transportation – primarily with C.N.R.

[6] The VPA obtained the Appellant's United States Visa which is issued in three-year increments. It paid for his apartment rent and medical insurance, but not for his day-to-day food or meals unless he was entertaining for business reasons.

[7] The Appellant kept his home in Richmond and paid for its expenses. His daughter and her child moved into part of it. His wife accompanied him to Chicago. He:

1. did not change his Royal Bank account but had its mailing address changed to Chicago;
2. obtained an Illinois driver's licence;
3. took his car and had it licensed and insured in the U.S.A.;
4. took his wife to the United States;
5. rented an apartment at VPA's expense – at first furnished and, when that was cancelled, he and his wife moved to an unfurnished apartment again at VPA's expense, all in 2002;
6. took out a non-resident membership in his B.C. golf club but did not join a golf club or a club in the U.S.A.;
7. did not do any other changes of address respecting his Canadian postal address or telephone number;
8. and his wife did not make any new friends in Chicago.

[8] In 2002 the Appellant spent 203 days in the U.S.A. and 162 days in Canada.

[9] The question, in the words of subsection 6(6), is whether in 2002 when in Chicago the Appellant received an amount for his board and lodging at a special work site at which his duties were of a temporary nature. Respondent's counsel raised particular attention to the fact that the Appellant's day-to-day "board" was not paid for by VPA.

[10] The Appellant and VPA's contract was not for an indeterminate period of employment. Moreover, VPA and Mr. Rozumiak both viewed Mr. Rozumiak and his duties as temporary – an experiment to discover the lay of the land. Mr. Rozumiak had never signed such a contract before and VPA had no office of its own in the United States. The contract was extended in 2004 for a further year to the end of Mr. Rozumiak's Visa and the office was closed as a failure at the end of that time; but neither party foresaw these events in 2002.

[11] On this basis, the Court finds that the Appellant's duties were of a temporary nature when the original contract was signed. His duties were to test the market. He was an older, experienced man who had his roots in the Vancouver area who had the knowledge to test the market for VPA. Their contract was terminable by either party in 3 months' notice. Chicago was not VPA's regular place of business, nor was the office premises which the Appellant rented for VPA – he was the only employee at that site and he traveled from it outside of the Chicago area about one week each month. The firm the office was rented from had similar office premises in other major American cities with facilities Mr. Rozumiak could use when on the road.

[12] The Appellant fulfilled the requirements of subsection 6(6) in 2002. The appeal is allowed. The Appellant is awarded his taxable costs respecting the appeal.

Signed at Saskatoon, Saskatchewan, this 28th day of December 2005.

"D.W. Beaubier"

Beaubier, J.

CITATION: 2005TCC811
COURT FILE NO.: 2005-13(IT)I
STYLE OF CAUSE: Myron Rozumiak v. The Queen
PLACE OF HEARING: Vancouver, British Columbia
DATE OF HEARING: December 16, 2005
REASONS FOR JUDGEMENT BY: The Honourable Justice D.W. Beaubier
DATE OF JUDGMENT: December 28, 2005

APPEARANCES:

Agent for the Appellant: Stuart Crown
Counsel for the Respondent: John Gibb-Carsley Solicitor
Articling Student: Kevin MacGillvary

COUNSEL OF RECORD:

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Name:

Firm:

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