Docket: 2006-1120(IT)I

BETWEEN:

JULIEN BLACKBURN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 19, 2007, at Québec, Quebec.

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the Appellant: Maxime Allaire

Counsel for the Respondent: Christina Ham

JUDGMENT

The appeal from the assessments under the *Income Tax Act* for the 2002 and 2003 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, in the 2002 taxation year, the $4,800 paid for the unit of the La Réserve motel is deductible and $1,595.28 in cellular telephone charges is deductible and that in the 2003 taxation year, $1,088.39 in cellular telephone charges is deductible, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 24th day of July 2007.

"Gaston Jorré"

Jorré J.

Translation certified true

on this 21st day of August 2007.

Daniela Possamai, Translator

Citation: 2007TCC284
Date: 20070724
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REASONS FOR JUDGMENT

Jorré J.

Issues

[1] The Appellant, Mr. Blackburn, was employed by Équipement Fédéral, Division de Gestion KCL West Inc. He was paid on commission.

[2] In filing his income tax returns for the 2002 and 2003 taxation years, the Appellant claimed certain employment expenses:

Expenses claimed	2002	2003
Lodging	$5,400	$4,340
Camera	$377	
Insurance		$252
Telephone, Internet	$2,246	$2,652
TOTAL	$8,023	$7,244

See Exhibits I-2 and I-3.

[3] In issuing a reassessment on January 24, 2005, the Minister of National Revenue (the "Minister) disallowed the deduction of those expenses.

[4] At the beginning of the hearing, counsel for the Appellant informed the Court that his client did not challenge the expenses claimed for the camera, insurance and Internet.

[5] There are therefore two issues, namely:

(1) Whether the Appellant could deduct the amounts indicated as lodging expenses.
(2) Whether he could deduct caller charges.

As to the first issue, the Appellant's main position was that they were deductible office expenses. Alternately, the Appellant argued that they were deductible travel expenses pursuant to paragraph 8(1)(*h*) of the *Income Tax Act* ("the Act").

[6] The first issue to be solved is the nature of the $5,400 and $4,340, respectively, deducted at the "Lodging" line of the Statement of Employment Expenses filed with the 2002 and 2003 employment reports. Are they lodging expenses or office expenses? If they are lodging expenses, are they expenses of a personal nature or deductible travel expenses?

Facts – motel unit/dwelling

Quantum

[7] Although the amount claimed in 2002 was $5,400, at the hearing the Appellant only claimed $4,800 in 2002 ($3,600 in rent plus $1,200 in "superintendent and cleaning fees"—see Exhibit A-4). This quantum was not challenged.

[8] The amount claimed in 2003 was $4,340. At the hearing, the Appellant filed a list of work expenses for 2003 (Exhibit A-5). The quantum of the amounts related to the dwelling on that list was not challenged. The list contains the following expenses:

Rent	$3,315.00
Vidéotron	$716.51
Hydro Sherbrooke	$307.98
TOTAL	$4,329.49

The total amount more or less reflects the $4,340 claimed in his income tax return.

[9] There is no evidence as to the nature or purpose of the payments made to Vidéotron.[1] I must therefore conclude that the dwelling expenses are only $3,622.98, that is rent plus the payments made to Hydro Sherbrooke.

[10] In short, the quantum of expenses in 2002 and 2003 was $4,800 and $3,622.98, respectively.

Use of the motel unit/ dwelling

[11] The Appellant was a sales representative for the company "Équipement Fédéral" during the two years in issue. Équipement Fédéral was a heavy equipment dealership for Komatsu and Timberjack.

[12] During the two years in question, the Appellant's sales territory was the Eastern Townships of Quebec. When the Appellant accepted this position, he lived in Saint-Georges de Beauce. Owing to his experience, his bosses asked him to assist them by taking this job on a temporary basis, just until the employer hired someone from Sherbrooke. The Appellant expected to fill this position for five or six months.

[13] The drive from Saint-Georges de Beauce to Sherbrooke is about an hour and a half, more than three hours per round trip.

[14] The Appellant's entire social and family life was in Saint-Georges de Beauce. The Appellant's spouse remained in Saint-Georges de Beauce and the Appellant lived in Saint-Georges when the hearing of this case was heard.

[15] The expenses claimed on the "Lodging" line of the Statement of Employment Expenses were for renting a motel room at La Réserve in Sherbrooke in 2002 and for renting a dwelling in Sherbrooke on Jacques-Cartier Street in 2003.

[16] In 2002, the Appellant had an agreement with the owner of the motel that he would always have the same room. He would arrive on Monday morning and leave the Friday.

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[1] It is possible that they were Internet charges, claim abandoned by the Appellant. That is not certain considering that Internet charges are indicated only in the Statement of Employment Expenses for 2002 (Exhibit I-2).

[17] In 2003, according to Exhibits A-5 and A-3, the Appellant paid $310 per month in rent from January to June, $155 in July and $260 from August to December. In testifying, the Appellant did not explain these variations, but the receipts (Exhibit A-3) from January to July indicate in the second line, after the Appellant name's, "21." The receipts from August to December indicate "27." On the receipt for the month of August it is stated [translation] ". . . for August's rent, half of the month." It would appear that the Appellant changed units after the month of August and that he only rented a unit for eleven and a half months.

[18] The Appellant testified that he used the unit at the La Réserve motel in 2002 and the dwelling on Jacques-Cartier Street in 2003 as his office. He stated that his employer required him to have an office, that 98% of the use of the unit at the La Réserve motel and the dwelling on Jacques-Cartier Street was for work purposes and that among other things they were the places where he regularly met with customers.

[19] The Appellant filed (Exhibit A-1) Form T2200 for 2002 and 2003. Part B was prepared and signed by the employer. In Part B, Question 9a) on both forms asks

> "Did you require this employee under a contract of employment to:
>
> - rent an office away from your place of business or use a portion of his or her home?"

In Exhibit A-1, the answer indicated on the forms for 2002 and 2003 is "yes."

[20] However, the original form for 2002 (Exhibit I-2) clearly indicates that the answer is "no." During the cross-examination, the Appellant admitted that he changed the answer from "no" to "yes" on the 2002 form he filed (Exhibit A-1).

[21] The expenses in question appear at the "Lodging" line of the Statements of Employment Expenses filed with the income tax returns (Exhibits I-2 and I-3), and not at the "Other expenses" line where it is possible to specify that the expenses are for office rent.

[22] The Appellant admitted that he might sleep in Sherbrooke two to three times a week depending on the weather conditions and travel time.

[23] In his testimony, he said that he regularly worked from 6:30 or 7 a.m. to 9:30 or 10 p.m. This means that the times he slept in Saint-Georges de Beauce, he left Saint-Georges at 5 or 5:30 in the morning and that he got back into Saint-Georges at 11 or 11:30 at night, only to leave Saint-Georges again six hours later.

[24] According to the testimony of Ms. Couturier, the Canada Revenue Agency auditor, at the draft assessment stage, the Appellant said that he worked 40 hours per week.

[25] The price of the equipment sold by the Appellant ranged from $100,000 to over a million dollars.

[26] The Appellant testified that he would go visit customers and that he would meet not only with individuals who decided on the purchases, but also with workers on the sites, as the users have an influence on those who decide on purchases. Those visits could also be made at 7 in the morning by bringing doughnuts to the work site, throughout the day or by going to supper with the foreman.

[27] The Appellant drove about 69,000 km on business in 2002 (Exhibit I-1) and about 66,000 km in 2003 (Exhibit I-4). The employer reimbursed his vehicle expenses at the rate of 26¢ per kilometre.

[28] With so many kilometres, it is obvious that the Appellant spent many hours travelling and meeting with his customers at their workplace.

[29] During the cross-examination, the Appellant was unable to specify how frequently or regularly he met with customers at the unit of the La Réserve motel or at the dwelling on Jacques-Cartier Street.

[30] The Appellant did not produce an agenda or other similar document that could have provided details on who he met with, when and where.

[31] Ms. Couturier testified that at the beginning of the audit, the Appellant never mentioned that he met with customers at the unit of the La Réserve motel or at the dwelling on Jacques-Cartier Street. She testified that the Appellant said that he met with customers at the motel or at the dwelling only after the draft assessment was issued. After the draft was issued, he said that he spent 20 hours a week on the road and 20 hours meeting with customers at his place.

[32] Insofar as the Appellant worked very long hours as he described, he had no other choice but to very often sleep in Sherbrooke during the week. If, however, he worked 40 hours per week as he told the auditor at one stage of the "audit," it is obvious that by driving more than 65,000 km per year, he worked by travelling to meet with his customers.

[33] In assessing the overall evidence, including the factors described earlier, I conclude that the motel unit and the apartment on Jacques-Cartier Street were used for lodging in Sherbrooke, and not as an office. Although I do not exclude that they were used ancillary to the accomplishment of the Appellant's work, most of his work was performed elsewhere.

<u>Analysis of the first issue</u>

[34] Subsection 8(2) of the Act provides that

> "Except as permitted by this section, no deductions shall be made in computing a taxpayer's income . . . from an . . . employment."

Subsection 8(1) of the Act provides that

> "In computing a taxpayer's income . . . from an . . . 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."

[35] Considering that the motel unit and the apartment were not an office, the Appellant cannot avail himself of subparagraph 8(1)(*i*)(ii) of the Act to claim all of the amounts of $4,800 and $3,622.98 in 2002 and 2003, respectively.

[36] Does the ancillary use of the motel unit or apartment allow for a partial deduction of the amounts claimed? Factually, the evidence does not make it possible to determine that a portion of the expenses could be reasonably considered office expenses rather than lodging expenses.[2,3]

<u>Appellant's alternate argument</u>

[37] The Appellant's alternate position was that the expenses were deductible as travel expenses within the meaning of paragraph 8(1)(*h*).

[38] The Appellant ordinarily worked away from the employer's place of business or in different places. He was required under the contract of employment to pay the travel expenses he incurred in the performance of his employment duties (Exhibit I-1, first issue).

[39] The issue that remains is "Whether they are travel expenses or personal expenses."

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[2] In the case of 2002, even if such a determination could be made, it is unnecessary given the finding that the Appellant may nonetheless deduct those expenses. See the following paragraphs.

For the same reason, it is not necessary to assess the impact of subsection 8(10) of the Act on Question 9a) of T2200 for 2002 (Exhibit I-1).

[3] As for 2003, the apartment is a "self-contained domestic establishment" within the meaning of subsection 248(1) of the Act. The Appellant regularly resided in the apartment within the meaning of subsection 8(13) of the Act when he worked in Sherbrooke. Considering that the apartment was not the place where the Appellant principally performed his duties (subparagraph 8(13)(*a*)(i)) and that the evidence did not reveal that there was a work space that was used exclusively for the Appellant's employment (subparagraph 8(13)(*a*)(ii)), subsection 8(13) disallows the deduction of part of the rent.

[40] In order to settle that issue, it is pertinent to take into account the fact that the Appellant's social and family life was in Saint-Georges de Beauce, that his wife was in Saint-Georges and that his family residence was still in Saint-Georges. The Appellant travelled from Saint-Georges to Sherbrooke for work.

[41] It is also necessary to take into account the principle that the choice to live in one city rather than another is a personal choice and that the expenses incurred to get to work are personal expenses and are not deductible.

[42] If an individual who lives in one city takes a job in another city that is very far from his or her home, he or she cannot deduct the costs incurred by the choice not to move. That includes not only transportation, but also food and lodging.[4] However, the Act provides for the deduction of moving expenses.[5]

[43] We therefore have two important principles:

(1) Travel expenses incurred in the performance of one's employment duties are deductible.
(2) However, expenses incurred by the choice of where one lives are personal expenses.

[44] At what point does the decision to travel rather than to move become a personal choice? One cannot reasonably conclude that the fact that one does not relocate for a business trip of a few weeks is a personal choice. However, if someone takes a permanent position in another far away city, there cannot be any doubt that it is a personal choice if the person keeps his or her house and family in his or her hometown and chooses to travel between the two cities every Monday morning and Friday evening and to rent a small apartment in the city where he or she works.

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[4] See the decision of the House of Lords in *Ricketts* v. *Colquhoun* [1926] A.C. 1 cited in *Maurice Samson* v. *MNR* [1943] CTC 47, a decision of Thorson J. of the Exchequer Court. In *Ricketts*, a lawyer living and practising law in London held an office in Portsmouth and claimed the deduction of his transportation expenses between London and Portsmouth as well as his hotel expenses in Portsmouth. The House of Lords decided that the fact that he lived far from his work in Portsmouth was a personal choice and disallowed those expenses.

[5] Section 62.

[45] In this case, it is very important to mention that the Appellant already worked for Équipement Fédéral when he took the position based in Sherbrooke and that he expected to fill that position for only five to six months.

[46] Considering the effort involved in moving and moving again, one cannot characterize as a personal choice the fact that someone is transferred by his or her employer to another city on a temporary basis for a relatively short period of time.

[47] If the temporary employment is prolonged, there is a point where the choice to move becomes personal.

[48] In *Attorney General of Canada* v. *Alain Tremblay*,[6] an RCMP officer was sent to Montréal to take an English course for a period of about eight months; the Federal Court of Appeal accepted that the Appellant deduct the lodging and meal expenses paid to the family with whom he stayed.[7]

[49] In the circumstances of the instant case, particularly considering the fact that originally the employment was to last only five to six months, it is reasonable to consider that the lodging expenses of $4,800 in 2002 were deductible travel expenses. However, after 2002, the choice not to move became a personal choice.

Second issue – cellular phone charges

[50] During 2002, the Appellant incurred cellular telephone charges of $3,288.56; Équipement Fédéral reimbursed $1,200 and the Appellant claimed a deduction of $2,238.56 (Exhibit A-4).

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[6] FCA decision of November 26, 1997: http://decisions.fca-caf.gc.ca/en/1997/a-145-96/a-145-96.html; 98 DTC 6008.

[7] The Appellant cited *Gariépy* [2006] 2 C.T.C. 2033; the circumstances in *Gariépy* are quite different. Mr. Gariépy was employed by the fire department and lived fairly close to his work , at a distance of 30 or 40 km. He could easily go to work every regular working day – from Monday to Friday, 8 a.m. to 4:30 p.m. He was also required to be on call one week out of three, 24 hours a day. During the 168 hours the Appellant was on call, he was required by his employer to stay in town to be able to quickly respond to emergencies, but could not stay at the fire station.

[51] During 2003, the Appellant incurred cellular telephone charges of $3,816.41; Équipement Fédéral reimbursed $2,155.56 and the Appellant claimed the difference of $1,660.85 as a deductible expense (Exhibit A-5).

[52] Where cellular telephone charges are incurred for business purposes, they are deductible in accordance with paragraph 8(1)(*f*). The issue is therefore one of fact.

[53] Ms. Couturier, the auditor, testified that she contacted the employer and that the employer told her that the Appellant was entitled to receive a maximum allowance of $280 per month for telecommunication expenses payable upon presentation of invoices. The Respondent concluded that all the expenses that were not paid by the employer had to be personal expenses.

[54] The Appellant testified that the reimbursable amount varied over the years—that at first it was $100 per month and that that amount gradually increased.

[55] The Appellant filed his telephone bills for seven of the 24 months—he was unable to obtain the others and used the process of elimination to determine personal calls. According to that process, a little over 9% of the calls were personal (Exhibit A-6).

[56] I accept the Appellant's testimony on that point. However, the method used by the Appellant to review the bills was to eliminate calls made to telephone numbers that were personal calls. For all of the calls received by the Appellant, the telephone bills (Exhibit A-6) simply show the Appellant's cellular telephone number. In order to take into account the fact that a portion of the calls received are personal, it is necessary to adjust the percentage of personal calls. I conclude that overall 15% of all the calls were personal.

[57] Accordingly, the deductible amount for the cellular telephone for 2003 is $1,088.39.[8]

[58] For 2002, the deductible amount is $1,595.28.[9]

[59] In 2003, the Appellant claimed $2,652 in telephone charges in his income tax return (Exhibit I-3). That amount included $1,660.85 in cellular telephone charges not reimbursed plus $990.68 in telephone charges incurred from the dwelling (Exhibit A-5). No evidence was provided to establish that the telephone in the dwelling was used for business purposes; accordingly, no portion of the $990.68 is deductible.

Conclusion

[60] To conclude, the appeal is allowed without costs[10] and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that

(1) in the 2002 taxation year,
  (a) the $4,800 paid for the unit of the La Réserve motel is deductible and
  (b) $1,595.28 in cellular telephone charges is deductible and that

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8 Calculation: $3,816.41 X 0.85 = $3,243.95
$3,243.95 - $2,155.56 (reimbursed by the employer) = $1,088.39, the deductible amount.

9 Calculation: $3,288.56 X 0.85 = $2,795.28
$2,795.28 - $1,200.00 (reimbursed by the employer) = $1,595.28, the deductible amount.

10 Paragraph 18.26(1)(*f*) provides that no costs shall be awarded unless the judgment reduces the aggregate of all amounts in issue by more than one-half. In this case, the Appellant originally claimed $15,267 in additional deductions (paragraph A.2 of the Notice of Appeal). This judgment refers the matter back for reassessment on the basis that the Appellant is entitled $7,483.67 in additional deductions, a little less than one-half. Without knowing the marginal rate, it is impossible to know whether the impact on the tax will exceed the threshold by one-half.

But even if the threshold were exceeded, I would not award the costs in this case for two reasons. First, success is more or less shared equally. Second, as described in paragraphs [19] and [20], the Appellant filed in evidence a copy of Form T2200 for 2002. However, the Appellant changed the employer's original answer to Question 9a) of Part B of Exhibit A-1 before filing it. In direct examination, he never said that he changed the answer to Question 9a). It was not until the cross-examination that he admitted having changed the answer to the question. This conduct is unacceptable.

(2) in the 2003 taxation year, $1,088.39 in cellular telephone charges is deductible.

Signed at Ottawa, Canada, this 24th day of July 2007.

"Gaston Jorré"

Jorré J.

Translation certified true

on this 21st day of August 2007.

Daniela Possamai, Translator

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APPEARANCES:

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