Docket: 2007-1742(IT)G

BETWEEN:

GIUSEPPE AGOSTINI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on January 12, 2009, at Toronto, Ontario.
Before: The Honourable Justice Lucie Lamarre

Appearances:

| | |
|---|---|
| Counsel for the Appellant: | John David Buote<br>Stella Kyriacou |
| Counsel for the Respondent: | Paolo Torchetti |

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**JUDGMENT**

The appeals from the assessments made under the *Income Tax Act* for the 2002 and 2003 taxation years are allowed, with costs, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the additional amounts to be included in the appellant's income are to be reduced by $53,755 for 2002 and by $52,000 for 2003. The additional income for 2002 will be $18,245 instead of $72,000. The additional income for 2003 will be $25,154 instead of $77,154. The penalties under subsection 163(2) of the Act are cancelled.

Signed at Montréal, Québec, this 16th day of February 2009.

« Lucie Lamarre »

Lamarre J.

Citation: 2009 TCC 87
Date: 20090216
Docket: 2007-1742(IT)G

BETWEEN:

GIUSEPPE AGOSTINI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

**REASONS FOR JUDGMENT**

La juge Lamarre

[1] For the 2002 and 2003 taxation years, the appellant was assessed by the Minister of National Revenue (the **Minister**) with respect to the amounts of $72,000 and $77,154 respectively that he received and did not report as income.

[2] The appellant, a civil engineer, was employed by Yukon Construction Inc., (**Yukon**) under a contract of employment dated March 1, 2001, to work in the Collingwood area in the province of Ontario on a construction project for the Intrawest Group. The project involved building new housing in the Blue Mountains in the County of Grey.

[3] The contract filed as Exhibit A-1, Tab 1, gives a description of the duties of the appellant, who was hired specifically as a concrete forming foreman. His duties as listed in the contract, his salary and his travelling expenses are set out below:

Construction Inc.

March 1, 2001

**Position**: Concrete Forming Foreman

**Description of Duties**: (duties include but are not limited to the following)

- Supervise and act as first contact to employees on assigned sites
- Ensure safe working practices are observed at all times and conduct work hazard training to all new employees
- Report and investigate on any accident or hazardous situation taken place on assigned sites
- Supervise the use of hired equipment and ensure contactors [*sic*] are completing work to expectations
- Monitor the available budget, materials and equipment requirements
- Select and ensure the proper use of tools and materials
- Monitor resources required on site and recruit additional resources as deemed necessary to complete work orders efficiently
- Ensure project status is communicated to client and superiors efficiently and accurately
- Liaise with union in regards to new and existing employees
- Perform job duties on any assigned site, which may be out of town
- Attend trade shows when required, in or outside of Canada
- Attend job training seminars in or outside of Canada

**Wages / Salary / Travelling Expense**:

- Base Salary $1000.00/wk
- Mileage: $0.50 / km
- Lodging: $150 /day (out of town)
- Annual Trade Shows: $150 / week

**N.B.:** Expenses paid out will be reconciled on an annual basis.

[4] Mr. Loreto Perruzza, Yukon's general manager, testified, confirming the terms of the above contract that he, on behalf of Yukon, and the appellant had signed. This contract was in force throughout 2002 and 2003. The appellant said that the contract awarded by Intrawest to Yukon was anticipated to last 6 to 9 months. It was, however, extended, and the appellant worked under that contract for a two-year period, that is, in 2002 and 2003.

[5] The appellant's principal residence was and still is in Woodbridge, Ontario, which is located approximately 125 kilometres from the construction site in

Collingwood. The appellant had to be on site five days per week. He would leave home early Monday morning and come back Wednesday to report to Yukon's head office in Woodbridge and to pick up the paycheques for Yukon's employees on the construction site. He would return to the site on Thursday morning and come back home on Friday evening, or sometimes Saturday morning.

[6] He was given a travel allowance of $0.50 per kilometre. The appellant received $13,000 per year from Yukon to travel from his home to the work site in Collingwood (125 km x 2, twice a week for 52 weeks at $0.50 per km = $13,000). This amount was declared by Yukon as having been paid to the appellant for transportation on the Declaration of Exemption - Employment at a Special Work Site form (Exhibit A-1, Tab 23 and Tab 28). This allowance was paid at a flat rate and the appellant did not have to provide any voucher or keep a logbook.

[7] The appellant testified that, when in Collingwood during the summertime, he slept in his truck, built for five passengers. In the wintertime, he shared a room with another worker. He did not produce any voucher. He said that he paid his roommate cash. The appellant received a lodging allowance from Yukon of $150 per day, for which he did not have to submit any voucher. The amount of $150 per day was established in conformity with the collective agreement with the union. The total received for lodging in 2002 and 2003 was $39,000 per year ($150 times five days a week times 52 weeks a year).

[8] The appellant also received $7,800 per year from Yukon to attend trade shows ($150 per week times 52 weeks). The appellant said that he attended five shows in total in 2002 and 2003. One was in New Orleans, one in Hawaii, and the others in Italy. Except for one, he went to all of them with his wife, Angela Agostini, who confirmed this. Mr. Perruzza said that the appellant was given this allowance to attend, once or twice a year, trade shows dealing with topics related to concrete forming and that there was no need to provide vouchers. It is my understanding that as long as the appellant brought new ideas or purchased new equipment for the business that would help Yukon be more profitable, no questions would be asked regarding his use of the allowance. Mr. Perruzza said that it is very common in the industry to attend such trade shows.

[9] The appellant also received an allowance from Yukon for travel in and around Collingwood to be present at employees' union meetings or to meet potential suppliers or clients once or twice a week. This allowance is included in the amount of $14,000 shown under the item "other" on the TD4 form (Declaration of Exemption -

Employment at a Special Work Site) filed for 2002 (Exhibit A-1, Tab 23), and in the amount of $25,800 shown on the TD4 form filed for 2003 (Exhibit A-1, Tab 28).

[10] In completing his tax returns, the appellant initially reported employment income of $37,000 for 2002, as per the T4 slip issued by Yukon for that year (Exhibit R-1, Tab 4). With respect to the total allowances paid to the appellant in 2002, Yukon initially issued a Statement of Contract Payments (Form T5018) showing construction subcontractor payments of $72,000 (Exhibit R-1, Tab 5). The appellant testified that he never received that form, which was allegedly sent to his residence in Woodbridge. He did not report that amount in his income as he considered it to be a reasonable allowance given to him by his employer to reimburse him for costs he incurred personally for the benefit of his employer. The employer subsequently produced an amended Statement of Contract Payments (T5018) reducing to nil the subcontractor payments to the appellant in 2002 (Exhibit R-1, Tab 7). At the same time, Yukon issued an amended T4 slip for the appellant showing employment income of $109,000 for the year 2002 (thus including the $72,000 allowance in employment income but also showing it as a non-taxable allowance (Exhibit R-1, Tab 6, boxes 14 and 40)).

[11] A Declaration of Conditions of Employment (Form T2200) was thereafter filed for 2002, stating that the appellant had received a fixed allowance and that he was required to pay his own expenses (Exhibit R-1, Tab 9).

[12] For 2003, the appellant declared employment income of $52,000, as per the T4 slip issued by Yukon (Exhibit R-1, Tab 12). Yukon had originally issued a T5018 form showing subcontractor payments of $77,154.27 (Exhibit R-1, Tab 13). This form was later amended to reduce that amount to nil (Exhibit R-1, Tab 15) and an amended T4 slip was issued showing employment income of $129,154.27, including a non-taxable allowance of $77,154.27 (Exhibit R-1, Tab 14, boxes 14 and 40). A Declaration of Conditions of Employment similar to the one produced for 2002 was also filed for 2003 (Exhibit R-1, Tab 17).

[13] Ms. Phyllis McLeod, an auditor with the Canada Revenue Agency (**CRA**), testified. She said that the allowances received were taxable, as the appellant did not prove that he incurred any expenses relating to his work with Yukon. He did not provide any vouchers for expenses that he purportedly incurred in Collingwood. He did not provide proof that he really attended trade shows. She also spoke to Ms. Maria Pizzuti at Yukon, who said that Yukon provided board and lodging in Collingwood and supplied a vehicle and a gas card to the appellant. This was denied by the appellant. According to Mr. Perruzza, Ms. Pizzuti was the lady who

erroneously considered the appellant to be a subcontractor. In the end, Ms. McLeod included the allowances received by the appellant in income without allowing any deductions with respect thereto and imposed a penalty pursuant to subsection 163(2) of the *Income tax Act* (**ITA**).

Analysis

[14] Counsel for the appellant itemized in four different categories the allowances received.

1. Allowance related to trade shows: $7,800 per year

[15] Counsel for the appellant first argued that no benefit was conferred pursuant to paragraph 6(1)(*a*) of the ITA in respect of this item. The relevant part of paragraph 6(1)(*a*) reads as follow:

> (1) There shall be included in computing the income of a taxpayer for a taxation year as income from an office or employment such of the following amounts as are applicable:
>
> > (*a*) **Value of benefits** – the value of board, lodging and other benefits of any kind whatever received or enjoyed by the taxpayer in the year in respect of, in the course of, or by virtue of an office or employment . . .

[16] Counsel argued that the predominant purpose of the trade show allowance received by the appellant was to further the employer's business and that personal enjoyment was merely incidental. He therefore concluded that this allowance was not taxable (*Lowe v. The Queen*, 96 DTC 6226 (FCA), referred to in *McGoldrick v. The Queen*, 2003 TCC 427 at paragraph 17). This would be true if the appellant could prove that he attended trade shows for the employer and that his personal benefit was in fact only incidental. The appellant testified that he made three trips in 2002, one to New Orleans, one to Hawaii and one to Bari, Italy. In 2003, he went to Milan and Bari, both in Italy. According to Exhibit A-1, Tab 32, the trip to New Orleans in January 2002 cost $1,755. A hotel bill shows that he stayed there three nights, from January 9 through January 12, 2002 (Exhibit R-1, Tab 22, 3rd page). The appellant also filed an ExpoCard showing that he attended a convention in New Orleans during the period from January 9 through January 12, 2002 (Exhibit A-2). The evidence indicates clearly that he did attend a trade show in New Orleans in January 2002.

[17] With respect to Hawaii and Italy, however, the evidence is less clear. According to a hotel bill filed at Tab 22 of Exhibit R-1, 4th to 7th pages, he stayed at the Hilton Waikoloa Village in Hawaii from January 26 to February 1, 2002, that is, a whole week. There is no documentary evidence that he attended a trade show there.

[18] With respect to the trip to Bari, Italy, a plane ticket invoice was filed showing that the appellant and his wife flew to Bari on September 8, 2002 and returned on September 26, 2002, having stayed two and a half weeks (Exhibit R-1, Tab 22, 18th page).

[19] In 2003, the appellant flew to Milan with his wife on November 12 and returned on November 26, a two-week trip (Exhibit R-1, Tab 22, 8th from last page). Mrs. Angela Agostini testified that she did not accompany her husband on this trip, which is contradicted by the flight ticket invoice. The appellant was not able to provide any documentation showing that he attended any trade shows while in Milan. As for the trip to Bari in 2003, I found nothing concerning it in the documents filed in evidence.

[20] I therefore conclude that, apart from the trip to New Orleans, all the trips were predominantly for pleasure and not for business. The allowance of $7,800 per year received by the appellant is therefore taxable, with the exception of $1,755 for the trip to New Orleans in 2002, as per the figure given by the appellant in Exhibit A-1, Tab 32, and confirmed by the Visa credit card invoice (Exhibit R-1, Tab 22).

2. Allowance for board and lodging: $39,000 per year

[21] Counsel for the appellant relies on paragraph 6(6)(*a*) of the ITA to claim that this allowance is not taxable. That paragraph reads as follows:

> 6(6) **Employment at special work site or remote location** – Notwithstanding subsection (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
>
> (ii) a location at which, by virtue of its remoteness from any established community, the taxpayer could not reasonably be expected to establish and maintain a self-contained domestic establishment,
>
> if the period during which the taxpayer was required by the taxpayer's duties to be away from the taxpayer's principal place of residence, or to be at the special work site or location, was not less than 36 hours. . . .

[22] I do not think that there is any dispute as to the fact that the appellant received an allowance for board and lodging. An allowance is defined as follows in *Gagnon v. The Queen*, [1986] 1 S.C.R. 264 (QL), at paragraph 21:

> 21. According to the definition in *Pascoe*, for a sum of money to be regarded as an "allowance" it must meet three conditions: (1) the amount must be limited and predetermined; (2) the amount must be paid to enable the recipient to discharge a certain type of expense; (3) the amount must be at the complete disposition of the recipient, who is not required to account for it to anyone.

[23] Here, the allowance received was a sum that was limited and predetermined ($150 per day spent out of town); it was paid to meet a certain type of expense (namely lodging, which obviously includes board; see *Transport Baie-Comeau inc. v. R.*, 2006 CarswellNat 4412). The amount paid must be at the complete disposal of the recipient, who must not be required to account for it to anyone, which is the case here.

[24] The allowance in question was a reasonable amount as it was based on what was required to be paid under the collective agreement. It was paid for the time that the appellant had to work at a special work site (in Collingwood), a fact that is not disputed by the respondent. On that work site, the appellant had to perform duties of a temporary nature (the appellant was assigned to a contract that was supposed to last from 6 to 9 months, but was ultimately extended to two years). The appellant also kept his principal residence in Woodbridge, going back there twice a week. The only

condition which is of concern to the respondent in applying paragraph 6(6)(*a*) in this case is the requirement that the allowance must be paid to the taxpayer in respect of expenses he has incurred for board and lodging. Although it is obvious that the appellant had to feed himself while working in Collingwood, the evidence is somewhat contradictory and nebulous as regards lodging. The appellant did not provide any vouchers with reference thereto. He said that he slept in his truck in the summertime and shared a room with a co-worker in the wintertime. He said as well that he paid the co-worker in cash. On the other hand, the auditor had information from a Yukon representative, Maria Pizzuti, that the appellant's lodging was paid for by the employer.

[25] Mr. Perruzza, Yukon's general manager, testified that some kind of chalet was available to accommodate several employees. He said, however, that the contract provided for the payment of an allowance to the appellant to cover his costs for lodging. The appellant said that he could not share space with a number of other people in a single room because of health problems. He preferred to sleep in his truck in the summertime. In the wintertime he had no choice but to share a room with a co-worker.

[26] Paragraph 6(6)(*a*) contains the words "in respect of expenses the taxpayer has incurred". Obviously, the appellant paid for his truck, in which he slept during the summer. But he had to sleep somewhere else in the wintertime. He could not use the employer's accommodation, if such there was, because of his health problems. A lodging allowance was specifically provided for in his contract, and I conclude that the allowance received was in respect of expenses he incurred for board and lodging. Moreover, the evidence reveals that he stayed three nights (sometimes four) per week in the Collingwood area. I am thus of the view that all the conditions required under paragraph 6(6)(*a*) have been met. This allowance is therefore not taxable.

<u>3. Transportation allowance to travel from the appellant's residence to the work site: $13,000 per year</u>

[27] Counsel for the appellant argues that this allowance is not taxable under paragraph 6(6)(*b*), which reads as follows:

> 6(6) **Employment at special work site or remote location** – Notwithstanding subsection (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,

> (*b*) transportation between
>
> > (i) the principal place of residence and the special work site referred to in subparagraph (*a*)(i), or
> >
> > (ii) the location referred to in subparagraph (*a*)(ii) and a location in Canada or a location in the country in which the taxpayer is employed,
>
> in respect of a period described in paragraph (*a*) during which the taxpayer received board and lodging, or a reasonable allowance in respect of board and lodging, from the taxpayer's employer.

[28] The transportation allowance is an allowance under the criteria set out in *Gagnon*, *supra*. The amount thereof was $0.50 per kilometre for transportation from the appellant's principal place of residence in Woodbridge to the special work site (Collingwood). Counsel for the respondent argues that the appellant did not prove that he used his own vehicle. However, Mr. Perruzza, testifying for the employer, did not contradict the appellant on this point and his testimony was not challenged in cross-examination. I therefore conclude that the $13,000 transportation allowance meets the test of paragraph 6(6)(*b*) of the ITA and is not taxable.

4. The balance of the allowance for travel expenses: $12,200 in 2002 and $17,354 in 2003

[29] Counsel for the appellant states that the appellant was paid for his local travel expenses in Collingwood. The appellant was required to travel in the surrounding areas to find new suppliers or to attend employees' union meetings. This travel was related to Yukon's business activities, as was confirmed by the general manager. Counsel for the appellant argues that the allowance was a reasonable one received in connection with negotiating contracts for his employer, and is not taxable pursuant to subparagraph 6(1)(*b*)(v), which reads as follows:

> 6(1) **Amounts to be included as income from office or employment** – There shall be included in computing the income of a taxpayer for a taxation year as income from an office or employment such of the following amounts as are applicable:
>
> > [. . .]
> >
> > (*b*) **Personal or living expenses** – all amounts received by the taxpayer in the year as an allowance for personal or living expenses or as an allowance for any other purpose, except

> [. . .]
>
> (v) reasonable allowances for travel expenses received by an employee from the employee's employer in respect of a period when the employee was employed in connection with the selling of property or negotiating of contracts for the employee's employer,
>
> [. . .]

[30] Counsel for the respondent says that there is no evidence of any travelling done for any such purpose. The appellant did not keep a logbook. Some travel in the Collingwood area was obviously required by the employer. However, we do not know whether the allowance received did in fact benefit the appellant personally. According to the amended T4 slips, the appellant received total allowances of $72,000 in 2002 and $77,154.27 in 2003. If we take away the allowance for trade shows ($7,800), for transportation back and forth between the appellant's residence and the work site ($13,000) and for board and lodging ($39,000), we are left with an amount of $12,200 for 2002 and of $17,354 for 2003 for travel in the Collingwood area. In my view, this allowance is unreasonably high if we compare it to the allowance of $13,000 per year for travel between the appellant's home and the work site. The burden of proof is on the appellant in this regard, and he did not satisfy me that the allowance he received in connection with negotiating contracts for Yukon was a reasonable one, that would be exempt from taxation under subparagraph 6(1)(*b*)(v) of the ITA.

Penalties

[31] The penalties are cancelled as I have decided that the assessed additional income should be reduced by approximately 70 per cent.

Decision

[32] The appeals are allowed, with costs, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the additional amounts to be included in the appellant's income are to be reduced by $53,755 for 2002 and by $52,000 for 2003. The additional income for 2002 will be $18,245 instead of $72,000. The additional income for 2003 will be $25,154 instead of $77,154. The penalties under subsection 163(2) of the Act are cancelled.

Signed at Montréal, Québec, this 16th day of February 2009.

« Lucie Lamarre »

Lamarre J.

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| CITATION: | 2009 TCC 87 |
| COURT FILE NO.: | 2007-1742(IT)G |
| STYLE OF CAUSE: | GIUSEPPE AGOSTINI v. HER MAJESTY THE QUEEN |
| PLACE OF HEARING: | Toronto, Ontario |
| DATE OF HEARING: | January 12, 2009 |
| REASONS FOR JUDGMENT BY: | The Honourable Justice Lucie Lamarre |
| DATE OF JUDGMENT: | February 16, 2009 |

APPEARANCES:

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| Counsel for the Appellant: | John David Buote<br>Stella Kyriacou |
| Counsel for the Respondent: | Paolo Torchetti |

COUNSEL OF RECORD:

For the Appellant:

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| Name: | John David Buote |
| Firm: | |

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