

REASONS FOR JUDGMENT

(Delivered Orally in Vancouver, B.C. on August 29, 2006)

JUSTICE: Thank you. This is an appeal from reassessments of the appellant's 1999 to 2004 taxation years. The appellant conceded that with the Minister's allowance of his claim for a disability tax credit transfer from a dependent there was no longer any item in dispute for the 2003 and 2004 taxation years, and therefore the appeal for those years is dismissed.

For the appellant's 1999 and 2000 taxation years, the Minister disallowed certain deductions claimed by the appellant in calculating his income from business. In this appeal, the appellant is challenging the disallowance of amounts claimed for clothing, RRSP penalties, Costco membership fees, and the purchase of software.

For the 1999 and 2002 taxation year, the Minister imposed late filing penalties pursuant to subsection 162(1) of the *Income Tax Act*, and for the 2000 and 2001 taxation years, the Minister imposed penalties for repeat late filing pursuant to subsection 162(2) of the *Act*. The appellant is challenging all of those penalties.

The facts relied upon by the Minister in reassessing the appellant are set out in paragraph 32 of

1 the reply to the notice of appeal. Those assumptions will
2 form part of these reasons.

3 I would look firstly with the issue of the
4 disallowed deductions. The first disallowed item was for
5 clothing purchased in 1999 at a cost of \$6,014.83 and in
6 2000 at a cost of \$2,420.20. All of the clothing
7 consisted of items purchased at Ermengildo Zegna, an
8 exclusive men's wear shop. The appellant testified that
9 he purchased suits, ties, shirts and accessories. He
10 stated that these were worn for his work as a certified
11 financial planner and only for work purposes. He
12 testified that:

13 "We had put together an office in Langley and
14 spent approximately \$60,000 on it in 1997 or
15 1998,"

16 and that he needed suitable clothing to go with the
17 office. He also entered a letter from a sales associate
18 at the Zegna shop in support of his position.

19 With respect to the Costco fees, the
20 appellant spent \$48.15 to renew his membership at the
21 store to enable him to shop for office supplies and items
22 used in his business. The appellant stated that he did
23 not renew his membership in later years because he was
24 able to obtain the necessary products and supplies at
25 other stores.

1 With respect to the claim for \$2,289.47 for
2 the purchase of software, the appellant testified that
3 this was part of a separate business venture undertaken
4 with a friend. The business was connected with the sale
5 of music software, apparently, although it was not clear
6 to me what exact product was involved. The appellant did
7 not say what became of the venture.

8 Finally, the appellant gave evidence that
9 he reimbursed certain of his clients for RRSP penalties
10 that were imposed upon them for exceeding the foreign
11 content limit of their RRSP. This was done to keep the
12 clients; the appellant felt that they were at risk of
13 going elsewhere for financial planning services as a
14 result of incurring the penalties.

15 I infer that the penalties arose because
16 investments recommended by the appellant to the client for
17 their RRSP did not perform as successfully as anticipated,
18 causing the RRSP to go offside of the foreign content
19 rules.

20 On the matter of the late filing penalties,
21 the appellant admitted that each of his tax returns for
22 1999 through 2002 were late-filed. Furthermore, he did
23 not take issue with the fact that demands were made on him
24 by the Minister to file returns for 2000 and 2001, as set
25 out in the assumptions. However, the appellant testified

1 that he was under duress throughout the years in issue,
2 both in his personal and professional life. The list of
3 factors which created the duress included the death of his
4 mother in April, 2000; the diagnosis of his son with
5 diabetes in September, 2000; a break-in to his car in
6 April, 2001; a break-in to his office on August 28th, 2001;
7 the sale of the business he worked for in the spring of
8 2002; his move to a new firm at that time; the filing of a
9 complaint about him to the Financial Planning Standards
10 Council of Canada by a co-worker; and the making of
11 allegedly defamatory statements about him by the director
12 of his former company around the time of the sale of the
13 business. The appellant also added that the state of the
14 financial markets in light of the Bre-X and Enron scandals
15 and other well-publicized corporate scandals made his work
16 very difficult.

17 Particulars of all of these factors were
18 contained in documents entered by the appellant at the
19 hearing.

20 In support of his claim for the deduction
21 of the disputed expenses, the appellant referred to the
22 following cases: *Fardeau v. The Queen*, *Charron v. The*
23 *Queen*, *Symes v. The Queen*, and *65302 B.C. Limited v. The*
24 *Queen*. In *Fardeau*, the appellant RCMP officer was allowed
25 a deduction under Section 8 of the *Income Tax Act* for

1 items of clothing consumed in the course of his
2 employment. The requirements for deductability under
3 subparagraph 8(1)(iii) are quite different from those for
4 deductability as a business expense. Furthermore,
5 according to the *Fardeau* decision, the appellant was
6 required by his contract of employment to supply and pay
7 for the items of clothing in issue. I am not persuaded
8 that the circumstances of that case are sufficiently
9 similar to those of the case before me to make that
10 decision applicable.

11 In the *Charron* case, the appellant's claim
12 for the cost of a barrister's gown and accessories was
13 allowed to the extent of a deduction of CCA. However, no
14 analysis was provided for the decision, and therefore it
15 is of limited precedential value. The appellant also
16 stated that the Supreme Court decision in *Symes v. The*
17 *Queen* did not set out with precision what constituted a
18 personal expense and failed to take into account the
19 definition of the phrase "personal or living expense" in
20 subsection 248(1) of the *Act*.

21 The appellant also submitted that since the
22 deduction of clothing expenses is not specifically denied
23 under Section 18, that it should be admitted.

24 The appellant argued that his deduction of
25 the RRSP penalties should be allowed in light of the

1 decision of the Supreme Court of Canada in 65302 B.C.
2 *Limited*. To the extent penalties are paid in furtherance
3 of business purposes, he said, they should be deductible
4 and in this case the retention of clients was clearly a
5 business purpose.

6 Finally, the appellant submitted that the
7 evidence showed that he failed to file his tax returns on
8 time because he was under duress. He referred to a
9 Supreme Court decision in *The Queen v. Perka et al.* in
10 which the court considered the defence of duress or
11 necessity in relation to a charge of importing marijuana.
12 In my view, it is not necessary to consider this case,
13 given that there was ample evidence to show that the
14 appellant continued to work in his business and to conduct
15 his personal affairs, such that it could not be said his
16 breach of the *Act* was unavoidable or that, faced with the
17 alternatives, it would have been unreasonable to expect
18 him to comply with the law.

19 After considering all of the evidence and
20 the submissions made by both parties, I am of the view
21 that the clothing expenditures and software purchase by
22 the appellant are personal expenses and therefore non-
23 deductible in computing income from business. Clothing is
24 *prima facie* a personal expense. This has been alluded to
25 by the Supreme Court of Canada in the *Symes* decision at

1 paragraphs 76 and 77.

2 The deduction of personal expenses is
3 specifically prohibited by subsection 18(1)(h) of the
4 *Income Tax Act*. The appellant's argument concerning the
5 definition of personal or living expenses in subsection
6 248(1) of the *Act* fails to take into account that the
7 definition is not an exhaustive one, but that the
8 particular expenses listed are included in the category of
9 expenses which are considered personal or living expenses.
10 The relevant part of that definition reads as follows:

11 "Personal or living expenses includes the
12 expenses of property maintained by any person
13 for the use or benefit of the taxpayer or any
14 person connected with the taxpayer by a blood
15 relationship, marriage or common-law
16 partnership or adoption, and not maintained in
17 connection with a business carried on for
18 profit, or with a reasonable expectation of
19 profit."

20 It is necessary to determine whether an
21 expense is of a personal nature regardless of whether it
22 relates to any property maintained by the taxpayer.
23 Expenses relating to one's personal appearance are the
24 very essence of a personal expense and involve choices
25 made by a taxpayer in preparing him or herself for work.

1 I conclude that the clothing in issue was used by the
2 appellant as personal wear in everyday business and
3 therefore its cost is not deductible.

4 I am also of the view that the RRSP penalty
5 reimbursements made by the appellant to clients of his
6 business are deductible, as are the costs of the Costco
7 membership fees. It was the appellant's evidence that the
8 penalties were reimbursements of amounts incurred by his
9 clients resulting from fluctuations in the value of
10 securities in their RRSP accounts on which the appellant
11 had input in directly as part of his business. The
12 appellant's assertion that the purpose of the
13 reimbursements was to retain his clients was not
14 challenged in cross-examination, and I accept it as true.
15 Nor was any evidence led to show a non-business or
16 personal purpose for the expenditure. Therefore, these
17 expenditures will be allowed.

18 I am also satisfied by the appellant that
19 the Costco membership fees were incurred for the purpose
20 of earning income from the appellant's business.

21 As far as the software expense in 2001 is
22 concerned, it appears it was originally claimed as an
23 expense in the appellant's business as a certified
24 financial planner. At the hearing, the appellant admitted
25 that it was not related to that business but suggested he

1 was intending to start another business involving music
2 software. The appellant has the onus to show that such a
3 business existed at the time the expenditure was incurred.
4 The evidence falls short on this point and the expense is
5 disallowed.

6 Finally, I am not satisfied that the
7 appellant has established that he took all reasonable
8 steps to comply with the filing requirements contained in
9 subsection 150(1) of the *Income Tax Act* for the 1999 and
10 2002 taxation years, or that he has shown any other reason
11 that the penalties imposed by the Minister under
12 subsections 162(1) and (2) should not be upheld.

13 The appellant conceded that all of the
14 requirements for the imposition of the penalties had been
15 satisfied, but asked that he be excused from paying the
16 penalties because of extenuating circumstances. This
17 Court, in *Bennett v. The Queen*, has held that a due
18 diligence defence is available to a taxpayer against whom
19 a late filing penalty has been assessed. The Court also
20 pointed out that a high degree of diligence is to be
21 expected from a taxpayer. I am not persuaded that the
22 appellant made all reasonable efforts to file his returns
23 in a timely manner for the four consecutive years in
24 issue. In fact, no evidence at all was presented to show
25 that the appellant had even attempted to prepare and file

1 returns in those years by the filing due dates. I
2 recognize that the appellant faced a number of challenges
3 in those years, but as I said earlier, no evidence was led
4 to relate those difficulties to the task of filing returns
5 or to show that he was incapacitated in any way by their
6 occurrence. Overall, there is insufficient evidence upon
7 which to find that the appellant was duly diligent in
8 attempting to meet the filing obligations contained in the
9 *Act*. The penalties are therefore upheld.

10 In summary, the appeal is allowed in part
11 only to the extent that the appellant will be allowed an
12 additional deduction of \$233.38 for his 1999 taxation
13 year, and an equal amount in his 2000 taxation year. In
14 all other respects, the appeals are dismissed.

15 Thank you.

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17 I HEREBY CERTIFY THAT THE FOREGOING
18 is a true and accurate transcript
19 of the proceedings herein to the
20 best of my skill and ability.

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S. Leeburn, COURT REPORTER

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