Docket: 2012-1145(IT)I

BETWEEN:

IAN BROWN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on December 14, 2012, at Calgary, Alberta

By: The Honourable Justice Campbell J. Miller

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Adam Gotfried

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2008 and 2009 taxation years are dismissed but costs are awarded to the Appellant in the amount of $200.

Signed at Ottawa, Canada, this 17th day of December 2012.

"Campbell J. Miller"

C. Miller J.

Citation: 2012 TCC 452
Date: 20121217
Docket: 2012-1145(IT)I

BETWEEN:

IAN BROWN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

C. Miller J.

[1] Mr. Brown appeals by way of the Informal Procedure the denial by the Minister of National Revenue (the "Minister") of his deduction of $10,634 in 2008 and $5,548 in 2009 as travel expenses. The expenses relate to the cost for Mr. Brown, an airline pilot with Cathay Pacific Airways, to travel from his home in Calgary to his base in Los Angeles.

Facts

[2] The facts are uncomplicated. In 2008 and 2009, Mr. Brown resided in Calgary. He was employed by USAB Ltd., a wholly-owned subsidiary of Cathay Pacific Airways Ltd., a fully registered company subject to the laws and regulations of Hong Kong ("Cathay Pacific"). Although recently Cathay Pacific changed its policy to have local employers in the jurisdictions in which it operates throughout the world, in 2008 and 2009 everything was run out of Hong Kong.

[3] Mr. Brown, as a captain for Cathay Pacific, did the vast majority of his flying between Los Angeles and Hong Kong. He incurred the expenses of $10,634 and $5,548 in 2008 and 2009 respectively to travel between Los Angeles and Calgary. He was unable to live in the United States of America. He took me through the United States Green Card application form as well as the Diversity Visa Program application. It was clear that only if Cathay Pacific sponsored Mr. Brown could he

have resided and worked out of Los Angeles. Given Cathay Pacific's policy at that time, sponsorship was not an option. I am satisfied that while working for Cathay Pacific in 2008 and 2009 Mr. Brown was simply unable to live in the United States. Mr. Brown acknowledged that the expenses were commuting expenses. There was no element of performing his duties as a captain for Cathay Pacific while commuting. He simply had to get to Los Angeles.

[4] Mr. Brown also testified, supported by a copy of Cathay Pacific's seniority list, that, as he was way down on the seniority list, the ability to successfully apply to have Vancouver or Toronto as a home base was very limited, if not impossible, at that stage.

Issue

i) Are Mr. Brown's travel expenses deductible in 2008 and 2009?

Analysis

[5] The applicable paragraph of the *Income Tax Act* (the "*Act*") is paragraph 8(1)(*h*):

> **8.**(1) 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
>
> …
>
> (*h*) where the taxpayer, in the year,
>
> (i) was ordinarily required to carry on the duties of the office or employment away from the employer's place of business or in different places, and
>
> (ii) was required under the contract of employment to pay the travel expenses incurred by the taxpayer in the performance of the duties of the office or employment,
>
> amounts expended by the taxpayer in the year (other than motor vehicle expenses) for travelling in the course of the office or employment, except where the taxpayer

> (iii) received an allowance for travel expenses that was, because of subparagraph 6(1)(*b*)(v), 6(1)(*b*)(vi) or 6(1)(*b*)(vii), not included in computing the taxpayer's income for the year, or
>
> (iii) claims a deduction for the year under paragraph 8(1)(*e*), 8(1)(*f*) or 8(1)(*g*);
>
> …

[6] The law is well settled that commuting expenses, the expense of getting to and from work, are not deductible. This has been confirmed by the Federal Court of Appeal in *Hogg v. R.*[1] which relies on the classic English case of *Ricketts v. Colquhoun*.[2] There is a similarity between the *Hogg* decision and Mr. Brown's situation, in that they both claimed they really had no choice: Mr. Hogg because of security reasons, and Mr. Brown because of immigration restrictions. The Federal Court of Appeal, however, emphasized that, regardless of the reason for the expense, to be deductible the provision clearly requires that the expenses be incurred by the employee while performing his duties. Mr. Hogg did not perform any duties, in transit, nor has Mr. Brown while traveling to Los Angeles. As Chief Justice Rip put it in the case of *O'Neil v. R.*,[3] also cited by the Federal Court of Appeal in *Hogg*, traveling in the course of the office or employment necessarily involves the performance of some service as compared to simply getting oneself to the place of work.

[7] Now that would ordinarily be the end of the analysis to dismiss Mr. Brown's claim, except for two further considerations:

a) the impact of personal choice, or lack thereof, in distinguishing personal expenses from travel expenses, as described by Justice Jorré in the recent decision of *Blackburn v. R.*;[4] and

b) the impact of a consent judgment of Justice Woods in the decision of *Hayden v. Her Majesty the Queen*,[5] a general procedure case, in which

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1 2002 FCA 177.

2 (1925), (1926) (AC1UKHL).

3 [2001] 1 C.T.C. 2091.

4 2007 TCC 284.

the Crown agreed to the deduction of similar expenses of an airline pilot to report to work outside Canada.

The *Blackburn* decision

[8] Mr. Brown argues that he had no choice but to live in Canada and commute to Los Angeles, and that this would render the travel expenses deductible as they were not personal expenses. In the *Blackburn* decision, Justice Jorré was dealing with an employee who was required on a temporary basis to work at a considerable distance from home. Justice Jorré stated:

> 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.
>
> 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.

[9] Implicit in his reasoning is that travel expenses incurred by an employer's requirement for temporary work away from home are indeed incurred in the performance of the employment duties, and not personal expenses. But Justice Jorré acknowledged that at some point the choice becomes personal. The emphasis, I believe, is still properly on whether the expenses were incurred in the performance of duties. In Mr. Brown's case it was not Cathay Pacific that required Mr. Brown to have to travel such a distance, and indeed there was nothing temporary about the

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[5] 1998 TCC 96774.

arrangement. Mr. Brown accepted the full-time position knowing full well that he would have an expensive commute. I do not see that *Blackburn* helps Mr. Brown's cause.

The *Hayden* decision

[10] In a consent judgment signed by Justice Woods in June 2005 she accepted the parties' deal and allowed the appeal with respect to travel costs for someone in a similar position as Mr. Brown, for travel to employment outside Canada. Regrettably, I received little more detail than that. Crown counsel had no further explanation as to why the Crown might have agreed to such a settlement, but it is this case upon which Mr. Brown has hung his hat.

[11] It is unfortunate that Mr. Brown and taxpayers generally might, with some justification, feel that because of this consent judgment such travel expenses are deductible, apparently from an administrative perspective. While it remains a judgment of this Court, it is a consent judgment, an agreement reached by the parties, not ultimately deliberated upon through trial by a judge. With no reasoning or analysis to review, I am not prepared to rely on it as having any precedential value. It appears to fly in the face of Federal Court of Appeal authority and jurisprudence generally on this issue.

[12] Mr. Brown cannot be faulted for believing that because the Government allowed a colleague of his a deduction for similar expenses, he should be entitled to similar treatment. He put considerable effort into preparing his case and providing documents. Notwithstanding the result, in these circumstances, I award Mr. Brown costs of $200. The appeals however are dismissed.

Signed at Ottawa, Canada, this 17th day of December 2012.

"Campbell J. Miller"

C. Miller J.

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APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Adam Gotfried

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