Docket: 2012-1383(IT)I

BETWEEN:

PATRICK AUCLAIR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on March 18, 2013, at Montréal, Quebec.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

Agents for the appellant:	Maxime Lemay Mylène Pelletier-Bégin
Counsel for the respondent:	Marie-France Dompierre

JUDGMENT

The appeal from the reassessment made pursuant to the *Income Tax Act* for the 2010 taxation year is dismissed.

Signed at Montréal, Quebec, on this 17th day of June 2013.

"Rommel G. Masse"

Masse D.J.

Translation certified true
on this 31st day of July 2013.
Elizabeth Tan, translator

Citation: 2013 TCC 188
Date: 20130617
Docket: 2012-1383(IT)I

BETWEEN:

PATRICK AUCLAIR,

Appellant,

and

HER MAJESTY THE QUEEN

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Masse D.J.

[1] In this case, the appellant is appealing from a notice of reassessment issued October 18, 2011, in which the Minister of National Revenue (the Minister) disallowed the $9,000 claimed as tuition fees by the appellant in his calculation of non-refundable credits for the 2010 taxation year. On or around December 6, 2011, the appellant served a Notice of Objection on the Minister against the reassessment. On February 8, 2012, the Minister confirmed the reassessment, resulting in the present appeal.

[2] At paragraph 22 of his amended notice of appeal, the appellant claimed tax credits under sections 118.5 and 118.6 of the *Income Tax Act*, RSC 1985, c. 1 (5th suppl.) (the Act) because he had taken training through which he acquired specific knowledge during his employment. At the hearing, the appellant indicated that he was abandoning this ground for appeal. The appeal is therefore only on the deduction of employment expenses under subparagraph 8(1)(*i*)(iii) of the Act.

Factual background

[3] In 2010, the appellant was employed by Pascan Aviation Inc. (hereinafter Pascan) in St. Hubert, Quebec, as a copilot for a BAE JetStream 32 aircraft. In August 2010, he was promoted, becoming a pilot. This promotion required him, as part of his job, to take complete BAE JetStream 32 qualification training. The practical portion of the appellant's training was held in August 2010 at the Flight Safety International training centre in St. Louis, Missouri in the United States. This was the only place in North America that offered training in a flight simulator for this type of aircraft. Pascan had a contract with Flight Safety International for the training and Pascan paid all the costs. Evidently, the appellant was not required to pay anything.

[4] The cost of the training was $12,000 and included theory courses, the plane ticket to get to St. Louis, simulator costs at Flight Safety, and costs related to the BAE JetStream 32 type rating. The cost of this training was not included in the appellant's income.

[5] Following this training, in a written agreement, Pascan required the appellant to agree to remain employed by Pascan for at least 24 months following the completion of this training. Otherwise, he would have to repay Pascan $500 for each of the 24 months he did not complete (see Exhibit A-1, Tab 3). The third paragraph of this agreement, dated August 26, 2010, states:

> [TRANSLATION]
> ...I agree to repay PASCAN AVIATION INC., as compensation for the time it will take PASCAN AVIATION INC. to replace me, the amount of **$500.00 per month remaining in the 24-month period**. This amount takes into consideration damages liquidated in advance, and said amount is payable on demand at the termination of employment.

[6] It goes without saying that if the appellant had continued working for Pascan for at least the 24 months following the training, the training would not have cost him anything.

[7] The appellant left his job at Pascan in March 2011 to go work for another airline carrier. Given his early departure, the appellant was required to repay Pascan (the amount of) $9,000 in damages, in accordance with the terms of the agreement signed August 26, 2010.

[8] In his tax return for the taxation year, the appellant claimed $9,000 as a non-refundable tax credit for tuition for the reimbursement to Pascan. On October 18, 2011, the Minister issued a reassessment that disallowed the credit claimed by the appellant. On or around December 6, 2011, the appellant served a notice of objection on the Minister against the reassessment. On February 8, 2012, the Minister confirmed the reassessment, resulting in the present appeal.

Appellant's argument

[9] The appellant claims that he can rightfully claim a deduction pursuant to subparagraph 8(1)(*i*)(iii) of the Act with respect to the $9,000 expense incurred to repay the training costs. The appellant argues that the training he took is equivalent to "***supplies that were consumed directly in the performance of the duties of the office or employment and that the officer or employee was required by the contract of employment to supply and pay for…to the extent that the taxpayer has not been reimbursed, and is not entitled to be reimbursed in respect thereof".***

[10] The appellant had to pay costs for the training he received in August 2010 to become a BAE JetStream 32 pilot. Moreover, the appellant claims that the evidence shows that he would be required to update his skills every 12 months in order to maintain his certification as a BAE JetStream 32 pilot. Once the training is completed, and he receives his certification, the training ("supply") is "consumed". The appellant states that he was required to incur costs and these costs were mandatory for his employment. Therefore, these costs are expenses incurred in the course of his employment. They are recurrent expenses for training ("supply") that, once used, is "consumed directly in the performance of the duties of the office or employment".

[11] Therefore, the appellant claims that he can rightfully claim expenses he incurred for training to become a BAE JetStream 32 pilot, pursuant to subparagraph 8(1)(*i*)(iii) of the Act and the Court must allow his appeal.

Respondent's argument

[12] The respondent claims that the training the appellant took cannot be considered a "supply". A "supply" within the meaning of the Act is generally a material item that can be consumed. It is impossible to consume training. Once acquired, training is always there to be used, but it can never be consumed. Subparagraph 8(1)(*i*)(iii) of the Act cannot apply and there is no other provision of

the Act that allows for a deduction of training costs except sections 118.5 and 118.6 and unfortunately, these two sections do not apply in this case.

[13] The respondent claims that in this case, it was not training fees but rather a payment made pursuant to a contractual obligation between an employer and its employee. This contractual obligation was unrelated to the execution of the appellant's employment duties but rather was regarding the termination of employment. It was the application of a penalty clause in a contract. Payment was not made in the course of his duties; it was made when he ceased working for Pascan. Therefore, the expenses were completely outside the scope of his duties. The respondent claims that the payment obligation results from the contract of termination that was signed on August 26, 2010. The expenses are not a direct result of carrying out his employment duties, and therefore subparagraph 8(1)(*i*)(iii) does not apply.

[14] The respondent therefore asks that the appeal be dismissed.

Legislative provisions

[15] The relevant provisions of the Act are:

> **8. (1) Deductions allowed** — 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
>
> ...
>
> *i)* amounts paid by the taxpayer in the year as
>
> ...
>
> (iii) the cost of supplies that were consumed directly in the performance of the duties of the office or employment and that the officer or employee was required by the contract of employment to supply and pay for,
>
> ...
>
> to the extent that the taxpayer has not been reimbursed, and is not entitled to be reimbursed in respect thereof
>
> ...

> **8. (2) General limitation** — Except as permitted by this section, no deductions shall be made in computing a taxpayer's income for a taxation year from an office or employment.

Analysis

[16] The appellant states that the term "supply" cannot be limited to material goods. The meaning of the term "supply" can vary a great deal depending on the context in which it is used. Training the appellant took may qualify as a supply because is it consistent with the provision of a service to the appellant. Training was directly consumed in the accomplishment of his employment duties because it was completely assimilated by the appellant. The appellant claims that the training he took was an essential condition for obtaining the position of pilot with his employer, and the payment of $9,000, which he repaid in accordance with the written agreement dated August 26, 2010, was a direct result of this obligation.

[17] The appellant claims that his training was taken progressively to its completion, meaning that for the duration of the training, it was consumed in the accomplishment of his duties. From the evidence submitted to record, the appellant was required to take updates every 12 months or the certification allowing him to pilot a BAE JetStream 32 would expire, and he would have to take the full training again. Therefore, the appellant feels that the training was consumed progressively over the 12 months during which the certification was valid and is completely consumed once the certification expires.

[18] Therefore, according to the appellant, all the conditions required under subparagraph 8(1)(*i*)(iii) of the Act were met. He paid for a supply that he consumed directly in the performance of his employment duties during the taxation year.

General principle

[19] The issue in this case is the interpretation of the Act, more specifically, determining what meanings are to be given to the terms "supply" and "consumed". The general principles of interpreting legislation are stated by the Supreme Court of Canada in *Canada Trustco Mortgage Company v. Canada*, 2005 SCC 54, [2005] 2 SCR 601. McLachlin C.J. established that:

> [10] It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and

> the intention of Parliament"... The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.
>
> ...
>
> [12] The provisions of the *Income Tax Act* must be interpreted in order to achieve consistency, predictability and fairness so that taxpayers may manage their affairs intelligently...

[20] In *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, para. 51, Iacobucci J. cites P. W. Hogg and J. E. Magee, *Principles of Canadian Income Tax Law* (2nd ed. 1997), pp. 475-476:

> [i]t would introduce intolerable uncertainty into the *Income Tax Act* if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision.

[21] Therefore the meaning of the terms "supply" and "consumed" must be determined in light of this general principle.

"Supply"

[22] The Act does not provide a definition of the word "supply". However, the meaning of the word can be determined through other federal statutes. According to section 123 of the *Excise Tax Act* (the ETA), R.S.C. (1985), c. E-15, which is also a federal tax statute, a "supply" includes "***the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition***." Therefore, "supplies" consist of property, namely objects or things, and the provision of a service. Training is certainly not property but training could be considered a provision of a service, at least within the meaning of the ETA.

[23] What is the ordinary meaning of the word "supply"? The appellant claims that the term "supply" found under subsection 8(1)(*i*)(iii) of the Act is a term whose meaning can vary a great deal, depending on the context in which it is used. In *Luks*

[No. 2] v. M.N.R., (1959) 58 DTC 1194, the Exchequer Court of Canada considered this issue in the context of paragraph 11(10)(*c*) of the former *Income Tax Act*. Thurlow J. declared the following at pages 1198-1199:

> 'Supplies' is a term the connotation of which may vary rather widely, according to the context in which it is used. In s. 11(10)(c) it is used in a context which is concerned with **things which are consumed** in the performance of the duties of employment. Many things may be consumed in the sense that they may be worn out or used up in the performance of duties of employment. The employer's plant or machinery may be worn out. The employee's clothing may be worn out. His tools may be worn out. And materials that go into me work, by whomsoever they may be provided, may be used up. **'Supplies' is a word of narrower meaning than 'things' and in this context does not embrace all things that may be consumed in performing the duties of employment, either in the sense of being worn out or used up. The line which separates what is included in it from what is not included may be difficult to define precisely but, in general, I think its natural meaning in this context is limited to materials that are used up in the performance of the duties of the employment. It obviously includes such items as gasoline for a blow torch but, in my opinion, it does not include the blow torch itself**. The latter, as well as tools in general, falls within the category of equipment.
>
> [Emphasis added.]

[24] Therefore, according to Thurlow J., a supply has the meaning of materials, namely objects or things that can be completely used in the performance of employment duties. However, this does not include tools or equipment. The meaning of "supply" is therefore very restricted.

[25] Mr. Lemay, for the appellant, provided us with examples of what a supply is. In *Fardeau v. The Queen*, [2002] 3 CTC 2169, Bowman A.C.J. of the Tax Court of Canada, as he then was, felt that it was time to question the opinion of Thurlow J. in *Luks*. Bowman A.C.J. stated, at paragraph 12:

> [12] There is no unanimity in this court on the question whether such things as shirts, socks and other similar items are supplies. We are not talking about tools here. We are talking about shirts and socks that wear out. With respect I think it is time to reconsider the approach of Thurlow, J. in *Luks*. While it might be right for tools it may be unrealistically narrow for shirts, socks and boots in the context of modern employment practices. Such things as clothing are certainly supplies.

[26] However, we must note that shirts, socks and boots are objects and not abstract things such as training.

[27] Home telephone and cellular telephone charges can be considered "supplies": see *McCann v. The Queen*, [2002] 3 CTC 2422 (TCC). In *Glen v. The Queen*, 2003 TCC 807, 2003 CarswellNat 5421, McArthur J. found that the cost of computer software used by a part-time university professor are supply costs within the meaning of subparagraph 8(1)(*i*)(iii). Hydro and fuel costs can be deducted as home-office expenses pursuant to subparagraph 8(1)(*i*)(iii) of the Act: see *Lester v. The Queen*, 2001 TCC 543 (CanLII); *Thompson v. Canada (M.N.R.)* (T.D.), [1980] T.C.J. No. 808, [1989] 3 F.C. 492 (FCC).

[28] This very brief overview of the case law shows us that the term "supply" within the meaning of subparagraph 8(1)(*i)*(iii) of the Act has a very limited meaning and is limited to things or material used directly in the performance of employment duties. Interpretation Bulletin No. IT35R2, dated August 26, 1994, published by the Canada Revenue Agency, gives more examples:

> **Supplies**
>
> 9. The word "supplies" as used in subparagraph 8(1)(i)(iii) is limited to materials that are used up directly in the performance of the duties of the employment. In addition to certain expenses related to a work space in a home, as explained in 5 above, supplies will usually include such items as
>
> (a) the cost of gasoline and oil used in the operation of power saws owned by employees in woods operations;
>
> (b) dynamite used by miners;
>
> (c) bandages and medicines used by salaried doctors;
>
> (d) telegrams, long-distance telephone calls and cellular telephone airtime that reasonably relate to the earning of employment income; and
>
> (e) various stationery items (other than books) used by teachers, such as pens, pencils, paper clips and charts.
>
> ...
>
> 10. Supplies, as used in subparagraph 8(1)(i)(iii), will not include:
>
> (a) the monthly basic service charge for a telephone line;
>
> (b) amounts paid to connect or licence a cellular telephone;
>
> (c) special clothing customarily worn or required to be worn by employees in the performance of their duties; and

(d) any types of tools which generally fall into the category of equipment.

[29] It is clear that administrative policies and interpretations are not determinative, but are entitled to weight and can be an important factor in case of doubt about the meaning of legislation: see *R. v. Nowegijick*, [1983] 1 S.C.R. 29, per Dickson J., at paragraph 25.

[30] In this case, I am not convinced that the training the appellant took can be considered a "supply" within the meaning of subparagraph 8(1)(*i*)(iii) of the Act. Training is not a thing or a material object that can be used directly in the performance of his employment duties. Although training could be considered a service provision, the type of service considered by the Act is a public service, such as natural gas and electricity. It is true that in *Glen v. The Queen, supra*, McArthur J. found that the cost of computer software used by a part-time university professor was included under the cost of supplies within the meaning of subparagraph 8(1)(*i*)(iii), but *Glen* is definitely (clearly) a distinct case. Software is certainly useful for a short time and must be updated frequently. Although software on a CD-Rom may be abstract material, it is still material. The material of software on a CD-Rom is not comparable to training that is retained as part of our overall knowledge and skills.

[31] In conclusion, I dismiss the appellant's claim that the training he took was a "supply" within the meaning of subparagraph 8(1)(*i*)(iii) of the Act.

"Consumed"

[32] What does the term "consumed" mean under subparagraph 8(1)(*i*)(iii) of the Act? Once again, the Act does not provide a definition of the term "consumed".

[33] In *Fardeau v. The Queen, supra,* Bowman A.C.J. of the Tax Court of Canada shares his insight, teaching us the following with regard to the meaning of the term "consumed" as found at subparagraph 8(1)(*i*)(iii) of the Act, at paragraph 15:

> [15] Consumed is a word of some elasticity. *The Oxford English Dictionary* ("*OED*") has three quarters of a page of definitions of consume. It is true that some of the definitions carry a connotation of destruction (as by fire) devouring (as by eating) or spending (as in the case of money). I do not however think there is any justification for requiring that there be instant annihilation. Consumption can be gradual. Perhaps one cannot consume a hammer but it does no violence to language to say that one consumes items of clothing by wearing them out. Indeed, one of the definitions of consume in the *OED* is:
>
> d. To wear out by use.

> ...
>
> [16] What of the monthly cost of the pager and cell phone? Certainly those services are "supplies". Just as obviously, they are consumed.

[34] In *Le Petit Robert Dictionnaire alphabétique et analogique de la langue française*, the word "*consommer*" [consume] is defined as follows: [TRANSLATION] "***Bring a thing to its completion. Consume a work***" and "***Bring (a thing) to destruction by using its substance; use it in a way that renders it unusable***". Paul-Émile Littré's *Le Dictionnaire de la langue française* defines "*consommer*" [consume] as: [TRANSLATION] "***2. Legal term. Consume one's right, used when the right one has to a thing is in force***."

[35] I have no doubt, as stated by Mr. Lemay for the appellant, that something may be consumed progressively, bit by bit, and it is not necessary for a thing to be destroyed or used up immediately: see *Fardeau, supra*. But to be consumed, it is necessary for the thing in question to eventually be rendered useless by being used. It is difficult to imagine how training could be consumed. Training can always be useful. Mr. Lemay claims that the training the appellant took is useless after 12 months have passed because updates must be taken in order to maintain the certification as a BAE 32 pilot. In my opinion, although it is necessary to have updates to maintain the pilot certification, this does not mean that the training he took was rendered useless or expired. It only requires an update. It is the certification that expires or becomes used up, not the training.

Directly in the performance of his employment duties

[36] For the appellant to be eligible to claim employment expenses as deductions under subparagraph 8(1)(*i*)(iii) of the Act, he must show that he paid amounts during the year as fees for supplies that were consumed "***directly in the performance of the duties of the office or employment that the officer or employee was required by the contract of employment to supply and pay for.***"

[37] It is clear that during the taxation year, the appellant was employed by Pascan and in the course of his employment, he had to take training. However, all the costs related to this training were paid for by Pascan and were not the appellant's responsibility. He was not required to pay anything back to Pascan. Once the appellant left his job, he was required to repay Pascan and this only applied if he left

within 24 months of completing the training, on a pro-rated basis: $500 for each of the 24 months he did not complete.

[38] In this case, even if I agreed that the training costs were "supplies" and even if these supplies were "consumed", I cannot accept that the amount paid was for material or for the provision of a service used directly in the performance of his employment duties. The amount paid was as damages liquidated in advance, payable upon termination of the employment and not in the performance of the appellant's employment duties.

[39] The payment was not made under a contract of employment but rather under a contract of termination of employment. Pascan paid all the appellant's training costs. Pascan could reasonably expect the appellant to continue working for Pascan for a period of time so that Pascan could benefit from its investment. Pascan could rightly ask the appellant for compensation if he were to leave his job within 24 months of completing the training. The appellant was under no obligation to pay or repay any amount as long as he did not leave his job.

[40] It is clear that the reimbursement, or the amount the appellant had to pay was not for his work, but came after he no longer worked for Pascan. Therefore, the expenses the appellant paid were not expenses directly required to perform his employment duties.

Conclusion

[41] Having considered all the evidence and the arguments presented to me, I come to the following conclusions:

a. The training the appellant took to become a BAE JetStream 32 pilot was not a "supply" within the meaning of subparagraph 8(1)(*i*)(iii) of the Act.

b. The training the appellant took to become a BAE JetStream 32 pilot was not "consumed" within the meaning of subparagraph 8(1)(*i*)(iii) of the Act.

c. The contract of employment did not require the appellant to provide and pay for the cost of training; Pascan paid all the costs on condition that the appellant remain a Pascan employee for at least 24 months following completion of the training. The appellant was not required to incur expenses to perform his employment duties.

d. The payment the appellant made was not for the cost of supplies consumed directly in the performance of his employment duties but rather for damages, payable upon the termination of his employment, not during the course of his employment.

e. The appellant did not incur fees or any direct obligations to perform his employment duties, but rather to allow him to leave his employment ahead of the 24 month time frame.

f. The contract dated August 26, 2010, is not an employment contract but rather a termination contract; this is the contract under which the appellant was required to pay damages, not his employment contract.

[42] I feel that subparagraph 8(1)(*i*)(iii) of the Act does not apply in this case. For these reasons, the appeal is dismissed.

[43] I also want to note that although the appellant did not obtain the result he was seeking, he was very well represented by Ms. Pelletier-Bégin and Mr. Lemay. These two young student attorneys were very well prepared and presented their case well. I wish them much success in the future. I would also like to thank Ms. Dompierre for her assistance to this Court.

Signed at Montréal, Quebec, this 17th day of June 2013.

"Rommel G. Masse"

Masse D.J.

Translation certified true
on this 31st day of July 2013.
Elizabeth Tan, Translator

CITATION:	2013 TCC 188
COURT FILE NO.:	2012-1383(IT)I
STYLE OF CAUSE:	PATRICK AUCLAIR v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	March 18, 2013
REASONS FOR JUDGMENT BY:	The Honourable Rommel G. Masse, Deputy Judge
DATE OF JUDGMENT:	June 17, 2013

APPEARANCES:

Agents for the appellant:	Maxime Lemay Mylène Pelletier-Bégin
Counsel for the respondent:	Marie-France Dompierre

COUNSEL OF RECORD:

For the appellant:

Name:

Firm:

For the respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada