Docket: 2011-2249(IT)I

BETWEEN:

KEVIN LAVIGNE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on June 4, 2013, at Montréal, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the appellant:	Michel Coderre
Counsel for the respondent:	Amélia Fink

JUDGMENT

The appeals from the reassessments made by the Minister of National Revenue pursuant to the *Income Tax Act* dated April 14, 2011, with regard to the 2006 and 2007 taxation years are dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 10th day of October 2013.

"Réal Favreau"

Favreau J.

Translation certified true
on this 22nd day of November 2013.
Elizabeth Tan, Translator

Citation: 2013 TCC 308
Date: 20131010
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BETWEEN:

KEVIN LAVIGNE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Favreau J.

[1] These are appeals under the informal procedure from the assessments made by the Minister of National Revenue (the Minister) pursuant to the *Income Tax Act*, R.S.C. (1985), c. 1 (5th Supp.) as amended (the Act), dated April 14, 2011, with regard to the 2006 and 2007 taxation years.

[2] In the reassessments made April 14, 2011, the following modifications were made to the appellant's income calculation:

	2006		**2007**	
	claimed	**disallowed**	**claimed**	**disallowed**
Motor vehicle	$14,811.79	$5,032.54	$15,996.38	$13,230.99
Meals and entertainment	$6,705.80	$6,705.80	$12,533.00	$12,533.00
Other expenditures	$4,733.85	$0	$8,533.81	$3,799.96
Parking fees	$1,300.00	$1,300.00	$1,300.00	$1,300.00
Total	$27,551.44	$13,038.34	$38,363.19	$30,863.95

[3] The issue is whether the Minister was justified in disallowing the expenses the appellant claimed as expenses incurred for the purpose of earning commission income of $13,038 for the 2006 taxation year and $30,864 for the 2007 taxation year.

[4] To make the reassessments, the Minister relied on the following findings and assumptions of fact, listed at paragraph 6 of the Amended Reply to the Notice of Appeal:

> [TRANSLATION]
> (a) When he filed his income tax return for the 2006 taxation year, the appellant reported employment income of $187,548 from "Rogers Communications Inc.", which included $105,565 in commission;
>
> (b) when he filed his income tax return for the 2007 taxation year, the appellant reported employment income of $185,155 from the same source, and which included $113,353 in commission;
>
> (c) until he left on July 20, 2007, the appellant acted as director of commercial accounts and sales representative for "Rogers Communications Inc.";
>
> (d) for the 2006 and 2007 taxation year, the appellant's conditions of employment were as follows:
>
> - the appellant was not required to pay for expenses he incurred when performing his duties, except those regarding the use of his car, for which he received an allowance;
> - he worked outside the employer's place of business, namely in Montreal, Quebec and surrounding areas;
> - he was required to use his own car to perform his duties;
> - he received a monthly allowance of $525 for his car lease, and received an additional $0.23 per km for travel exceeding 300 km per month. He received a car allowance of $6,000 in 2006 and $3,798 in 2007, which were included on the T4. As for the mileage reimbursements, using the amounts the employer repaid over a 16-month period, from March 2006 to July 2007, the auditor calculated that the appellant received the amounts of $2,585.36 for 2006 and $1,179.90 for 2007, which were not included in the T4;
> - he is not required to pay meal and entertainment expenses;
> - the employer repaid all costs related to his duties upon presentation of supporting documents, except those related to the use of his motor vehicle, for which he received an allowance;
>
> (e) for the 2006 and 2007 taxation years, the appellant incurred the following costs regarding the BMW and Volvo motor vehicles:

2006

Fuel	4,267.50
Maintenance and repairs	1,619.05
Insurance	1,190.70
Registration	435.00
Car wash	0.00
Lease	9,669.00
Sub-Total	**17,181.25**
Allowance	(-2,585.36)
Sub-Total	14,595.89
Use	67%
Total	**9,779.25**

2007	
Fuel	2,702.82
Maintenance and repairs	755.15
Insurance	639.90
Registration	471.00
Car wash	0.00
Lease	2,896.00
Sub-Total	**7,464.87**
Allowance	(-1,179.90)
Sub-Total	6,284.97
Use	44%
Total	**2,765.39**

- maintenance and repairs, insurance premiums, registration fees and car wash were granted based on the supporting documents submitted;
- the cost of leasing the BMW and Volvo motor vehicles were calculated in accordance with the provisions of section 67.3 of the ITA and subsection 7307(1) of the Regulations;
- since the appellant did not have any detailed record of his travels, the auditor estimated the annual distance driven to be 28,388 km for 2006 and 15,633 km for 2007, considering the odometer reading on the lease contract for the Volvo dated April 27, 2006 (30 km), the reading on a maintenance invoice dated July 9, 2007 (34,096 km) and the time between these two dates, 438 days (34,066 km X 365/438 = 28,388 km) and (28,388 km X 201/365 = 15,633 km);
- the business use percentage was revised from 80% to 67% for 2006 and from 80% to 44% for 2007;
- the mileage reimbursements estimated at $2,585.36 for 2006 and $1,179.90 for 2007 were not included in the T4 and were therefore deducted by the auditor from the overall costs the appellant claimed for the motor vehicle;

(f) the expenses related to meals and entertainment and parking were disallowed because they were repaid by the employer on presentation of invoices and as a result, were personal expenses;

(g) the entertainment and recreation costs claimed as other expenses were disallowed because they were incurred after the period of employment with "Rogers Communications Inc." and the appellant was unable to show that these expenses were incurred for the purpose of generating employment, property or business income.

[5] The appellant testified at the hearing and explained that he signed a contract of full-time employment with Rogers Wireless Inc. ("Rogers") on September 28, 2004. He started on October 18, 2004, as a representative for the business solutions, business sales sector, under the supervision of Sonia Guerriero. His place of work was 1200 McGill College Avenue. Pursuant to his contract of employment, the appellant would earn a base salary of $52,000 and he could participate in a 100% commission program. An annual base rate of $85,600 was used to calculate benefits and vacation pay. The appellant was also eligible for a monthly allowance of $525 for using his vehicle. The appellant's contract of employment did not contain any provisions regarding the repayment of expenses incurred in the course of his employment.

[6] During his testimony, the appellant claimed that in 2004, 2006 and 2007 he did not see Rogers' policies regarding expenses incurred by employees in the course of their employment; these policies, which were in force in 2006 and from January to July 2007, were presented at the hearing as Exhibit I-1, tab 15. However, the appellant admitted that Rogers repaid expenses that had been pre-approved. The appellant claimed expenses that were not repaid by Rogers or submitted to Rogers for repayment as employment expenses in his tax return. Expenses claimed and repaid by Rogers for the period of March 2006 to June 2007 were submitted as Exhibits I-2, tab 2, and were the object of a summary prepared by the Canada Revenue Agency (CRA) auditor, presented at the hearing as Exhibit I-3.

[7] The appellant was a successful salesperson. In 2006, he was the best salesperson in Canada and was part of the President's Club every year. In 2006, out of an employment income of $187,548, his commission income was $105,565, and in 2007, out of a total employment income of $185,155, his commission income was $113,353. To have such success, the appellant spent a great deal on restaurant and entertainment expenses and business development fees.

[8] The appellant ceased being employed by Rogers on June 30, 2007. For the period of July 1 to December 31, 2007, the appellant claimed the following expenses in his 2007 tax return:

(a) Motor vehicle – Volvo XC 90

• leasing costs =	$5,142.36
• fuel =	$2,938.21
• maintenance and repairs =	$1,442,63
• insurance =	$581.00
• registration =	$129.00
• driver's licence =	$109.00
• car wash =	$260.00
• parking =	$629.60
Sub-total =	$11,231.80

(b) Meals and entertainment = $5,849.45
deductible portion (50%) = $2,924.72

(c) Other expenses (entertainment and gifts) = $4,730.63
deductible portion (50%) = $2,365.31

[9] The appellant justified the deduction of the expenses described in the preceding paragraph by stating that he wanted to maintain contact with his clients while seeking to open a new Rogers store or acquire one with another Rogers salesperson; according to the appellant, these are steps to start a new business.

[10] During his testimony, the appellant made reference to the fact that Rogers representatives signed T-2200 forms called, "Declaration of Conditions of Employment" so their employees could deduct business expenses that were not repaid in the calculation of their income. Such forms for 2006 and 2007 were remitted to the appellant after they had been signed by an authorized Rogers representative. Gerry Hethrington signed the 2006 form and Josée Riendeau signed the 2007 form. In response to question 6 in these forms, which states: "Did you require this employee to pay other expenses for which the employee did not receive any allowance or repayment?", Rogers noted that it required the appellant to pay

other expenses, namely entertainment expenses, for which he did not receive any repayment.

[11] With regard to the repayment of automobile expenses, the appellant clarified that the monthly allowance of $525 corresponded to the first 300 kilometres driven per month and beyond that, he was eligible for additional $0.16 per kilometre for the period of January 1, 2006, to June 30, 2006. This allowance was increased to $0.23 per kilometre for the period of July 1, 2006, to June 30, 2007. The appellant noted that the information Josée Riendeau provided on this subject at paragraphs 7(*a*) and 11(*b*) of the questionnaire on the appellant's employment conditions dated May 21, 2009, and submitted as Exhibit I-1, tab 12, are not accurate since it indicates that the additional allowance was $0.23 per kilometre for 2006 and 2007.

[12] Patrick Camo, a co-worker of the appellant, testified at the hearing and confirmed that he knew of Rogers' policy on the repayment of expenses. In his opinion, Rogers employees were entitled to have pre-approved expenses repaid. Without prior approval, there was a possibility that the amounts would not be repaid; in this case, the expenses could be claimed in the tax return. He also explained that the approval process was discretionary and that employees had to provide the name of the clients or the business development opportunities. Alcohol and unusual or overly frequent expenses with the same client were not allowed. Receipts for expenses had to be produced with the reimbursement claim.

[13] Josée Riendeau, director of government sales at Rogers, testified for the respondent. In 2006, Ms. Riendeau did not have any contact with the appellant but in 2007 she became the head of three sales teams, including the appellant's. She admits that she signed the T-2200 form for the appellant in 2007. In her opinion, the employees were responsible for completing these forms and giving them to her for her to sign. In the case of the T-2200 for the 2007 taxation year, the appellant claimed that he did not fill it in. However, Ms. Riendeau testified that she verified the information in the form before signing it and that she asked for additional information internally but, when faced with the tax return deadline, she signed it on May 9, 2008, with no modifications.

[14] With regard to Rogers' expense repayment policy, Ms. Riendeau stated that the work-related expenses did not necessarily have to be pre-approved to be repaid. In her opinion, expenses related to business development were usually repaid, because during 2006 and 2007, there were no budgetary restrictions in this regard. Only unjustified expenses were not repaid by Rogers. On the questionnaire about the appellant's employment conditions for 2006 and 2007, which Ms. Riendeau

completed and signed on May 21, 2009, it states that all the costs incurred by the appellant for vehicle use, travel (hotel, meals, plane tickets) and drink, meals and entertainment fees were repaid by Rogers.

[15] Richard Fortier, CRA auditor, also testified at the hearing. He explained that during his audit, he disallowed all the expenses for drinks, meals and entertainment based on Ms. Riendeau's statements that these expenses were reimbursed in whole by Rogers. Moreover, all the expenses the appellant claimed for the months of August to December 2007 were disallowed because the appellant was no longer employed by Rogers and they were not incurred for the purpose of earning income.

[16] Mr. Fortier also explained how he determined the business use percentage for the appellant's Volvo vehicle. To estimate the distance driven, the auditor used a maintenance invoice dated July 7, 2009, which indicated that the odometer read 34,090 kilometres. According to the lease contract dated April 27, 2006, the odometer of the vehicle read 30 kilometres at that time. Over a period of 438 days, the appellant drove 34,060 kilometres. Annually, this represents 28,388 kilometres for 2006. For 2007, since the appellant's employment was terminated on July 20, 2007, resulting in 201 days out of 365, the distance driven was reduced to 15,633 (specifically 28,388 kilometres x 201/365 days).

[17] The mileage for business purposes was determined based on the information provided by the employer regarding the amounts claimed and the distance driven by the appellant during the period of March 27, 2006, to June 15, 2007, or 446 days. During this period, the appellant drove 14,440 kilometres, to which 4,800 kilometres were added, for 16 reimbursements paid by the employer (16 x 300 kilometres). The total driven for business during the 446-day period was therefore 19,240 kilometres, or 15,746 kilometres annually, which represents 55% of the total mileage driven by the appellant in 2006 (15,746/28,388). For 2007, the appellant drove 5,130 kilometres, to which 1,800 were added to take into consideration the six reimbursements paid by the employer (6 x 300 kilometres), for a total of 6,930 kilometres driven for business purposes out of a total of 15,633 kilometres (or 28,388 kilometres x 201/365 days). The percentage of kilometres driven for business purposes in 2007 was therefore 44%, or 6,930/15,633 kilometres.

[18] Following the notices of objection filed by the appellant, (*a*) an invoice from Conseil Immobilier Métropolitain for $4,733.85 was allowed, (*b*) the business use percentage for the appellant's motor vehicle for 2006 was increased from 55% to 67%, and (*c*) gas invoices submitted by the appellant were accepted.

[19] The appellant is no longer challenging the parking fees for $1,300 that were not accepted for the year.

Analysis and conclusion

[20] Deductions allowed in the calculation of a taxpayer's income from office or employment are listed at section 8 of the Act. Paragraph 8(1)(*f*) specifically addresses salespersons. Subsection 8(1) and paragraph 8(1)(*f*) state the following:

> 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
>
> ...
>
> *(f)* where the taxpayer was employed in the year in connection with the selling of property or negotiating of contracts for the taxpayer's employer, and
>
> (i) under the contract of employment was required to pay the taxpayer's own expenses,
> (ii) was ordinarily required to carry on the duties of the employment away from the employer's place of business,
> (iii) was remunerated in whole or part by commissions or other similar amounts fixed by reference to the volume of the sales made or the contracts negotiated, and
> (iv) was not in receipt of an allowance for travel expenses in respect of the taxation year that was, by virtue of subparagraph 6(1)(*b*)(v), not included in computing the taxpayer's income,
>
> amounts expended by the taxpayer in the year for the purpose of earning the income from the employment (not exceeding the commissions or other similar amounts referred to in subparagraph 8(1)(*f*)(iii) and received by the taxpayer in the year) to the extent that those amounts were not
>
> (v) outlays, losses or replacements of capital or payments on account of capital, except as described in paragraph 8(1)(*j*),
> (vi) outlays or expenses that would, by virtue of paragraph 18(1)(*l*), not be deductible in computing the taxpayer's income for the year if the employment were a business carried on by the taxpayer, or
> (vii) amounts the payment of which reduced the amount that would otherwise be included in computing the taxpayer's income for the year because of paragraph 6(1)(*e*);

[21] Subsection 8(2) of the Act imposes a general limitation, under which only the amounts permitted in section 8 are deductible in computing a taxpayer's income for a taxation year from an office or employment.

[22] The question of law to be decided is whether, pursuant to his contract of employment with Rogers, the appellant was required to pay his own expenses as required under subparagraph 8(1)(*f*)(i) of the Act.

[23] Since the appellant's contract of employment with Rogers contained nothing about the appellant's obligation to pay his own expenses, I do not see how the condition at subparagraph 8(1)(*f*)(i) of the Act can be met.

[24] The key difficulty in this case is that there is an apparent contradiction between the T-2200 forms signed by the authorized representatives of Rogers, which state that the employer required the appellant to incur other entertainment fees for which he received no allowance or repayment without specifying the amounts, and the information provided in the questionnaire on the employment conditions in which the signing authority, who had signed the appellant's 2007 T-2200 form, confirmed that all the fees incurred by the appellant were repaid by Rogers.

[25] Since Josée Riendeau signed both the 2007 T-2200 form and the questionnaire on the appellant's employment conditions, I rely on her testimony and her interpretation of the documents in question. During her testimony, Ms. Riendeau was very clear: the appellant was not required to incur expenses that had not been pre-approved because these expenses were sometimes not reimbursed. In those cases, Rogers considered these expenses were unnecessary, unjustified or unreasonable.

[26] In the circumstances, the appellant should not be permitted to deduct the meals and entertainment expenses from his employment income as claimed for the 2006 and 2007 taxation years.

[27] The calculation of the business use percentage for the appellant's vehicle, 67% for the 2006 taxation year and 44% for the 2007 taxation year, after the appellant's arguments at the objection stage, seem reasonable to me in the circumstances, considering the appellant did not submit a record of his travels.

[28] The expenses incurred in 2007 after his employment was terminated with Rogers cannot be deducted in the calculation of his income for the 2007 taxation year because the appellant did not provide sufficient clarifications that these expenses were incurred for the purpose of starting a new business. The appellant did not

provide any documentary evidence (business plan, offer to purchase, offer to finance or invoices) to show that his intention was to start a new business, namely to purchase a Rogers store.

[29] For these reasons, the appeals are dismissed.

Signed at Ottawa, Canada, this 10th day of October 2013.

"Réal Favreau"

Favreau J.

Translation certified true
on this 22nd day of November 2013.
Elizabeth Tan, Translator

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STYLE OF CAUSE:	Kevin Lavigne and Her Majesty the Queen
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DATE OF JUDGMENT:	October 10, 2013

APPEARANCES:

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