

BETWEEN:

MARC COSTANZO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 30, 2017, at Toronto, Ontario

Before: The Honourable Justice R  al Favreau

Appearances:

Agent for the Appellant: Rubin Cohen

Counsel for the Respondent: Caroline Ahn

JUDGMENT

The appeal from the reassessments dated October 8, 2015 for the appellant's 2009 and 2010 taxation years and from the reassessments dated March 17, 2016 for the appellant's 2008 and 2011 taxation years is allowed in accordance with the attached Reasons for Judgment. Consequently, the said reassessments are referred back to the Minister of National Revenue for reconsideration and reassessments on the basis that the expenses claimed by the appellant in computing his business income for the 2008, 2009, 2010 and 2011 taxation years are fully deductible except for the associate musician fees which are not deductible and for the telephone and utilities expenses which are partly deductible as follows:

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2008: \$ 3,982

2009: \$ 1,355

2010: \$ 1,871

2011: \$ 2,896

Signed at Ottawa, Canada, this 26th day of April 2017.

“Réal Favreau”

Favreau J.

Citation: 2017 TCC 58
Date: 20170426
Docket: 2016-2153(IT)I

BETWEEN:

MARC COSTANZO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from the reassessments dated October 8, 2015 for the appellant's 2009 and 2010 taxation years and from the reassessments dated March 17, 2016 for the appellant's 2008 and 2011 taxation years, made by the Minister of National Revenue (the "Minister"), under the *Income Tax Act*, R.S.C. 1985 (5th supp.), c. 1, as amended (the "*Act*").

[2] By way of the reassessments under appeal, the appellant's tax liability was determined as per the table below:

Year	Gross Business Income	Net Business Income	Interest	CPP
2008	\$ 56,493	\$ 29,638	Nil	\$ 1,294
2009	\$ 55,384	\$ 33,534	Nil	\$ 1,486
2010	\$ 73,504	\$ 55,799	Nil	\$ 2,163
2011	\$ 45,339	\$ 27,621	Nil	\$ 1,193

[3] At the beginning of the hearing of the appeal, the Minister made the following concessions:

- (a) except for the associate musician fees, and part of the telephone and utilities expenses, the rest of the expenses claimed by the appellant in computing his income for the 2008, 2009, 2010 and 2011 taxation years are fully deductible;
- (b) the associate musician fees claimed by the appellant in the amounts of \$7,835 for 2008, \$11,723 for 2009, \$31,722 for 2010 and \$700 for 2011, are not deductible;
- (c) the telephone and utilities expenses claimed by the appellant are partially deductible as per the table below:

Year	Expenses claimed	Expenses allowed
2008	\$ 6,636	\$ 3,982
2009	\$ 2,258	\$ 1,355
2010	\$ 3,119	\$ 1,871
2011	\$ 4,227	\$2,896

[4] As a result of the concessions referred to above, the only issue of this appeal is with respect to the so-called associate musician fees. The said fees are alleged to have been paid to Ms. Amy Todd and Mr. Scott McManus for musical services provided to the appellant in the following amounts for the 2008 to 2011 years:

Year	Fees paid to Amy Todd	Fees paid to Scott McManus
2008	\$ 1,700	\$ 6,135
2009	\$ 9,400	\$ 2,334
2010	\$ 26,500	\$ 5,200
2011	\$ 700	Nil

[5] Mr. Costanzo testified at the hearing. He explained that, during the years under appeal, he operated a sole proprietorship business as a performing artist (singer/musician) and freelance talent searcher. He also operated a music studio.

[6] During his testimony, Mr. Costanzo confirmed that his tax returns for the 2008, 2009, 2010 and 2011 taxation years were filed late on June 11, 2014 by Mr. Rubin Cohen, C.A., who was also his representative in court.

[7] Mr. Costanzo stated that he has been using the services of Ms. Todd since 2008 as a sounding board when he needs a perspective as to what type of sound, beat or rhythm is hot or cool at any particular time. He also stated that Ms. Todd is a very good friend that he used to date in 1999 and 2000 and with whom he lived for a short period in 2003.

[8] Mr. Costanzo indicated that he had no written contract with Ms. Todd for her services and that there were no specific terms and conditions regarding her remuneration. He paid her what he can afford. The payments to Ms. Todd were made irregularly by interact transfers or by cash.

[9] Mr. Costanzo explained that no fixed terms could be established concerning Ms. Todd's remuneration because the royalties he received for his songs were not paid to him on a regular basis.

[10] Mr. Costanzo also stated that he has not kept any records concerning the dates and the number of times he consulted Ms. Todd in any given week, month or year and that Ms. Todd did not invoice him for her services.

[11] Concerning Mr. McManus, Mr. Costanzo said that he retained his services for various musical tasks, like the mixing of tracks. Mr. McManus is an engineer who also has a music studio. Mr. Costanzo stated that he has no formal written contract with Mr. McManus because he is a friend. He further said that the costs of the services provided by Mr. McManus were below the fair market value of such services. Mr. McManus did not invoice the appellant for the services he rendered. The appellant has no records concerning the dates and number of times he consulted or retained the services of Mr. McManus in any given week, month or year.

[12] In terms of documentary evidence, Mr. Costanzo filed the following documents:

- (a) his tax returns for the 2008, 2009, 2010 and 2011 taxation years;
- (b) a document signed by Ms. Todd in which she confirmed having received from the appellant for music services the amounts indicated above;

- (c) a document signed by Mr. McManus in which he confirmed having received from the appellant for music services the amounts indicated above; and
- (d) a Canadian Imperial Bank of Commerce statement from his unlimited chequing account for the period from January 18, 2008 to April 17, 2008 showing that in the three-month period, Ms. Todd received \$780 and Mr. McManus received \$1,300.

[13] Mr. Costanzo's tax returns for the 2008, 2009, 2010 and 2011 taxation years were all filed late on June 11, 2014. The associate musician fees claimed by Mr. Costanzo represented, as a percentage of the total business expenses claimed, 20.4% for 2008, 31% for 2009, 58% for 2010 and 3% for 2011.

[14] Ms. Amy Todd testified at the hearing. She explained that she was a professional dancer and that she had no musical background. She stated that she did not work from 2008 to 2011 because her father wanted to commit suicide.

[15] Ms. Todd confirmed she was Mr. Costanzo's best friend and they lived together in the early 2000's. She said that she acted for him as a music consultant (sounding board). Mr. Costanzo contacted her every day, sometimes many times a day by telephone and by e-mail. There was no particular or formal arrangement made with Mr. Costanzo. She was paid by cash or by interact transfers. She did not receive payment in a lump sum. She did not send invoices to Mr. Costanzo for her services and she did not keep records of the dates and nature of the services requested by Mr. Costanzo. She stated that she has no idea of the value of the services she rendered. Mr. Costanzo alone decided on the amounts he was going to pay her and when.

[16] She confirmed that she received the amounts indicated in the document that she signed but these amounts were not reported for income tax purposes since she did not file any tax return for these years. In January 2017, Mr. Rubin Cohen, the appellant's representative, filed on her behalf, unsigned copies of her tax returns for the 2008 to 2011 taxation years to report the amounts received from Mr. Costanzo. The amounts reported were based on Mr. Costanzo's records and not on her own records of the money she received from Mr. Costanzo.

Legislation

[17] The relevant statutory provisions of the *Act* are the following:

18(1) In computing the income of a taxpayer from a business or property no deduction shall be made in respect of

(a) **General limitation** - an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property;

...

Personal and living expenses

(h) personal or living expenses of the taxpayer, other than travel expenses incurred by the taxpayer while away from home in the course of carrying on the taxpayer's business;

...

67 General limitation re expenses

In computing income, no deduction shall be made in respect of an outlay or expense in respect of which any amount is otherwise deductible under this Act, except to the extent that the outlay or expense was reasonable in the circumstances.

Analysis

[18] This appeal raises two issues:

(a) whether the claimed expenses were incurred to earn income from a business within the meaning of paragraph 18(1)(a) of the *Act*,

and if so,

(b) whether these expenses were reasonable in the circumstances so as to overcome the deduction prohibition of section 67 of the *Act*.

[19] As the income tax system is based on self-monitoring, the burden of proof of deductions and claims rests with the taxpayer (*Njenga v. Canada*, [1996] F.C.J. No. 1218 (Federal Court of Appeal)).

[20] Section 230 of the *Act* requires a taxpayer to keep adequate books and records to justify the deduction of the business expenses claimed. Mr. Costanzo, as

the taxpayer, is responsible for documenting his own affairs in a reasonable manner.

[21] Based on the evidence submitted in this appeal, I accept the fact that Mr. Costanzo was carrying on a commercial venture but the documentation supporting the claims is clearly insufficient to justify the deduction of the associate musician fees and that they were incurred for the purposes of earning income from a business.

[22] Mr. Costanzo filed his tax returns late; as late as six years after the 2008 fees were actually paid and only based on his recollection. He did not submit documentation showing the amount of fees paid, the dates of payment and the nature and frequency of the services provided. No formal or written agreement describing the general terms and conditions under which the services were to be provided, no invoice or receipt was submitted to the Court. His documentary evidence is mainly in the form of a bank statement for the period from January 18 to April 17, 2008, showing some transfers to Amy Todd and Scott McManus and in a letter from each one of them confirming that the fees were received from Mr. Costanzo. Both were very close friends of Mr. Costanzo.

[23] Mr. Costanzo has been very vague as to the nature of the services provided by his friends. Concerning the services provided by Mr. McManus, Mr. Costanzo said that he helped him in mixing sound track and that the amounts paid to him were well below the fair market value of the services that he received in exchange. Mr. McManus did not testify at the hearing. Concerning the services provided by Ms. Todd, Mr. Costanzo said that he used her as a sounding board for the type of music that is hot and cool. She testified at the hearing but her testimony was also very vague and indecisive. She has no records of telephone calls or work performed for Mr. Costanzo and she did not have a clue on the value of the services she rendered to Mr. Costanzo. She did not know how much money she received from Mr. Costanzo and she did not report the amounts received in her income tax returns for the years in which she was paid. She reported the fees received only in 2017 at the request of Mr. Costanzo's accountant, based on the information provided by Mr. Costanzo.

[24] Based on the foregoing reasons, I am not satisfied that, even if the expenses were in fact incurred as stated by the appellant, they were incurred for the purposes of earning income as set out in paragraph 18(1)(a) of the *Act*. The vague generalities that were presented as evidence are not adequate to discharge the burden of proof that the appellant has to meet.

[25] Furthermore, the associate musician fees claimed by the appellant were not reasonable in the circumstances.

[26] The appeal is allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessments on the basis that the expenses claimed by the appellant in computing his business income for the 2008, 2009, 2010 and 2011 taxation years are fully deductible except for the associate musician fees which are not deductible and for the telephone and utilities expenses which are partly deductible as follows:

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STYLE OF CAUSE: Marc Costanzo and Her Majesty the Queen
PLACE OF HEARING: Toronto, Ontario
DATE OF HEARING: January 30, 2017
REASONS FOR JUDGMENT BY: The Honourable Justice R  al Favreau
DATE OF JUDGMENT: April 26, 2017

APPEARANCES:

Agent for the Appellant: Rubin Cohen
Counsel for the Respondent: Caroline Ahn

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:

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