Docket: 2006-1264(IT)I

BETWEEN:

RAHIM ZOLGHADR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on February 23, 2007, at Toronto, Ontario

By: The Honourable Justice M.A. Mogan

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Laurent Bartleman

JUDGMENT

The appeals from reassessments made under the *Income Tax Act* for the 2001, 2002 and 2003 taxation years are allowed, and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that in computing income in each year, the Appellant is entitled to deduct the following business expenses:

	2001	2002	2003
Health & accident insurance	$525	$525	$525
Accounting fees	550	550	550
Tools	800	800	800
Cell phone	360	360	360
Work clothes	300	300	300
Goods and services tax paid			3,892

Total	$2,535	2,535	$6,427

Signed at Ottawa, Canada, this 10th of December, 2008.

"M.A. Mogan"

Mogan D.J.

Citation: 2008 TCC 669
Date: 20081210
Docket: 2006-1264(IT)I

BETWEEN:

RAHIM ZOLGHADR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Mogan D.J.

[1] These are appeals for the taxation years 2001, 2002, 2003, in which the Appellant deducted significant amounts as business expenses in the computation of his income. The Appellant is an independent contractor and not an employee, and so it is possible in those circumstances to have deductible expenses in the computation of income if they relate to the contract work being performed by the independent contractor. The amounts in the three years are significant. The Appellant claimed as business expenses in the 2001, $24,691, in 2002, $30,024, and in 2003, $32,975. His gross earnings in those years were in the range of $55,000 to $60,000, and so the amounts claimed as business expenses generally exceeded 40% of the gross revenue in each year. Upon reassessment, Revenue Canada disallowed effectively all of the expenses claimed, and the Appellant has appealed from those reassessments attempting to reinstate his claim to deduct the expenses at issue. The Appellant has elected the informal procedure.

[2] The Appellant is an aircraft mechanic. Although he is, by acknowledgement of the Respondent and on his own evidence, an independent contractor, he has at the same time many of the badges of employment, but I accept the fact that for tax purposes in the years under appeal, he is an independent contractor. The badges of employment appear from the brief description which follows.

[3] He has been connected with a company called HQ Aero Management Inc. for approximately nine years. He describes HQ as an agency which places workers at the

disposal of corporations engaged in the manufacture of aircraft. In the particular three years under appeal, there was an agreement between Mitsubishi, a Japanese manufacturer, and Bombardier, a Canadian manufacturer of many products including aircraft, to build a particular aircraft primarily in Canada.

[4] The Appellant explained that the engines and certain critical parts would be manufactured in Japan and shipped to a Bombardier facility in the Downsview area where they would be integrated into an assembly line to manufacture aircraft. He said that in the years under appeal, the orders for these aircraft were very high, that Bombardier was behind in its orders, and so the assembly line was working 24 hours a day, seven days a week. The Appellant worked from 10 to 12 hours a day, six days a week, and sometimes six and seven hours on Sunday. He is now a lead hand, like a supervisor but even at that time, worked as an aircraft mechanic, primarily on the wings and fuselage and riveting the parts of the aircraft that go together, as opposed to the actual engine itself which propels the machine.

[5] He is well paid in the range of $25 or more an hour, but as an independent contractor and not an employee. He does not belong to a union and does not get any higher hourly rate for extra hours and is paid straight time. He said he gets no extra amount for overtime and no vacation pay. He has no pension arrangement and no benefits. He makes out a timesheet each day explaining what he has done. He is required to buy his own tools which are virtually all power tools, operated by a pneumatic device for removing bolts from nuts which hold a wheel to the rim.

[6] Tools are costly and he says for that reason, he generally does not buy them new, but rather buys used tools from other workers who are leaving the employ of Bombardier, or going to work elsewhere and do not want to take their tools. There is a market for these used tools, and in order to save costs, he buys most of his tools used.

[7] The Appellant comes from Iran, and his mother tongue is Persian. He does speak English, but with some difficulty. Therefore, he could not be expected, having come to Canada only in 1995, to do his own income tax returns. The returns are prepared for him by a professional firm engaged in the business of doing tax returns. The Appellant provides them with receipts and other documents, and they make up quite an extensive return for him as an independent contractor. I gather from what he says that they are primarily responsible for advising him on the amount of these deductions. Revenue Canada challenged all the deduction amounts.

[8] The Appellant lives in Mississauga, about 40 kilometres from the plant where he works in the Downsview area of Ontario. So he commutes about 40 kilometres from Mississauga to the Downsview area, and 40 kilometres home each day. Once he arrives at his place of work, he describes that Bombardier has approximately 10 hangars, each of which holds seven or eight executive jet aircraft which are being built, so that a hangar itself would cover a significant area of ground. The whole enterprise at Downsview would be a significant area with eight or 10 hangars of that size, and he works in those hangars on assembly lines. He rarely has to leave the Downsview site of Bombardier where he performs his services as an independent contractor. When he is paid, he is actually paid by HQ which is the agency that "employs" him on behalf of Bombardier and Mitsubishi.

[9] I assume that HQ receives a commission, but I am only aware of that because the Appellant is paid by it, and not by either Bombardier or Mitsubishi. In the Book of Documents filed by the Respondent, Exhibit R-1, Tab 5 contains T-4 slips issued in the name of the Appellant by HQ for 2001, 2002 and 2003, showing employment income. So HQ regarded the Appellant, in one sense, as an employee, even though he thinks of himself as an independent contractor, and Revenue Canada has accepted that classification. I indicated that there is a serious question whether in law the Appellant is an employee or an independent contractor, but that question is not in issue in these appeals.

[10] The Appellant further explained that HQ does retain and remit employment insurance premiums and Canadian Pension Plan contributions, and has sometimes made provision for goods and service tax which I will discuss later. The long and short of it is that HQ issues a T4 to the Appellant which forms the basis of reporting his income for a particular taxation year. He delivers these documents to the accounting firm, Active Accountants and Associates in Mississauga, and they prepare his tax returns. He will go back a week or so later to pick up the prepared return.

[11] He was asked if he had any discussions with Active Accountants concerning the way they compute his income, and I gather he did not have a very extensive discussion because, as I have indicated, the Appellant speaks English well, but with quite a strong accent. It is perfectly obvious, listening to his testimony, that it is not his mother tongue, so he cannot be expected to have the facility of knowing about income taxes and reading income tax returns that a person raised in Canada might have. So I am concluding, without much direct evidence, that the amounts of deductions that he has claimed in the years under appeal, he was encouraged or advised to claim by Active Accountants. In that respect, I think he has not been well

advised by those people because they have been much too aggressive in advising him to deduct amounts which do not appear to be justified in the circumstances.

[12] In the Reply to the Notice of Appeal, there are attached Schedules “A”, “B” and “C”, one for each taxation year under appeal, indicating the various expenses claimed by the Appellant, which amounts were supported by vouchers, and what amounts were allowed or disallowed in the assessments under appeal. In substance, in each of the years, all amounts claimed were disallowed. I say in substance because in the year 2001, when the Appellant claimed tools of $1,100, he was allowed $127 apparently because there was a receipt for that. In the year 2002, he was not allowed any amount, and in 2003, he was allowed $152 for tools because there was a receipt provided for that. However, in 2003 he had claimed $1,565 for tools so as I say, in substance, all of the amounts claimed as expenses have been disallowed.

[13] I am going to deal with the expenses in groups, and I will use Schedule “A” for the year 2001 as representative of all three years. What I say about 2001 will have equal application to 2002 and 2003.

[14] The Appellant claims auto expenses under various headings: Fuel, usually in the range of $3,000; repairs in the range of $800; car washes, a nominal amount; insurance $4,200; the usual $74 for an Ontario licence plate; and interest of $478 which may be on money borrowed to buy a car; and capital cost allowance, which in 2001 of approximately $3,700. The total auto expenses are listed in that year as $13,238. There is a deduction of $6,178 for personal use, leaving a net auto expense claim of $7,060. Likewise, the next auto expense amounts claimed for 2002 were $10,171; and for 2003 were $10,286. All of those amounts must be disallowed in the computation of income because of the terms on which the Appellant works. He simply travels from his home in Mississauga to the place of work at Downsview, approximately 40 kilometres each way.

[15] There are many cases which establish the principle that, where a person is engaged in a work activity at one location only, and goes there every day to provide services through which he earns his income, simply driving from his home to that one location and back is a personal expense and not a business expense, and the cost of transportation is not deductible. The only time a person who is employed or even an independent contractor can deduct transportation costs is when the person, to earn his income, has to travel from one business location to another. If there is a principle business location, if he had to go out many times to other areas and locations to service his customers or clients, then that travel would be deductible. But the Appellant is, in effect, an employee at this location. He has no flexibility as to where

he goes. He goes to the hangars at the Bombardier facility in Downsview to earn his living every day. It may be the odd day where he might have to travel to some other hangar or an aircraft facility in and around the Toronto International Airport, but by his own evidence those are few and far between.

[16] He has to spend almost all of his time on or near the assembly line, because he is a critical person as an aircraft mechanic, and he has to keep working along with the thousands of other workers. He indicated Bombardier has about 5,000 people employed at this facility, and that is easy to imagine if they are running shifts 24 hours a day, seven days a week.

[17] Therefore, the total claim for auto expense has to be disallowed. I might say somewhat critically of the people who prepared the Appellant's tax returns, Active Accountants and Associates, that they should have been aware of this. It would not have required a very long interview by some person in that accounting firm with the Appellant to discern the fact that he is really only travelling from his home to the one work location and back, which would make the whole transportation costs non-deductible. I say his advisers ought to have known that. He is a new person in Canada being here only since 1995 and he cannot know the mores of our society and what is permitted or not. They should have helped him out with that.

[18] The Appellant has claimed the use of an office in his home. He described he has a room in the basement of approximately nine square meters where he has a computer and completes his timesheets. He indicated that making the timesheets can be time-consuming and that it takes him about half an hour per day, and then he submits them the following day. They are approved by either Bombardier or Mitsubishi and, on the basis of those timesheets, every two weeks he puts in an invoice. He is paid as an independent contractor on the basis of that invoice. But that is really not seeing customers or clients at the home. You do not need a space in the home for that and it does not satisfy the test. Therefore, the amounts claimed for use of the home for work purposes are also disallowed.

[19] There are a number of other items which I will list. Insurance each year is claimed in the range of $3,500. The Appellant said that that was accident and health insurance, to protect his income in case anything happened to him because he gets no benefit support. The $3,500 seems high and I would be inclined to allow something on that account, which I will come back to later.

[20] For meals and entertainment, he claimed modest amounts in the range of $500, but there is no evidence that he needs to do any entertainment, and so that is

disallowed also, as well as the office expenses of $1,650. That pertains to the use of the office in his home. He has a computer, but he explained that his computer is not plugged into the Bombardier manufacturing facility, and so it is a personal computer like most of us have in our homes. He has claimed a modest amount for supplies, a couple of hundred dollars. He claims fees of about $1,600 which he thinks were paid for preparation of his tax return. I will have something more to say about that later, because I would allow a modest amount even though there are no vouchers for that. The next item is telephone and utilities. I am not allowing any amount for that because there is no evidence that he needs those facilities at home to earn his income.

[21] For tools, I will allow him more than Revenue Canada has and I will also deal with that later. He says he needs a cell phone for his work because although there is a kind of walkie-talkie radio device provided by Bombardier, he says it is inadequate to speak when he is at any one of the 10 hangars, and often summoned from one place to another. I will allow a small amount for a cell phone.

[22] On the internet, he claims an amount which would be the connection to a server of about $500 for the year, and I would not allow that because it has not been shown that the internet is necessary for his operation or his enterprise. Also, he claims $150 for work clothes and I would allow something for that.

[23] I will not allow capital cost allowance because I do not see any capital assets in respect of which the capital cost is necessary to be claimed. I have disallowed work in the home. I am going to make some allowances and more than what Revenue Canada has allowed, and I intend to go through it now and identify what they are, and they will be the same for each year except for one item in the year 2003. I might say too that I am allowing these amounts without the production of receipts. Mr. Bartleman, counsel for the Respondent, has done a workmanlike job on behalf of his client in demonstrating there are no receipts and the frailties of these appeals, but they are informal appeals, and sometimes in the overall scheme of things, when the Court is satisfied that certain expenses may be real whether they are receipted and vouched or not. As a matter of fairness, amounts have to be allowed and that is what I propose to do and the amounts will be global.

[24] There are five items of expense on which I am going to permit the Appellant to deduct modest amounts in each year. They are as follows. For insurance, which the Appellant identified as health and accident, that would frequently be for an employee benefit which would be deductible, but certainly it is important for a person who is not employed but could be hurt on the job and have his work cut off. The amount claimed in each year is about $3,500 which seems high. I will allow 15% of that

amount, or $525. And so, I will allow the Appellant to deduct $525 in each year with respect to health and accident insurance.

[25] The next item is for fees, but I do not know what fees he actually pays to the people who prepare his returns. The amount claimed each year is $1,600 in 2001, $1,900 in 2002, and $1,900 in 2003. Those amounts seem high as well, but I will allow about one-third of $1,650, or $550.

[26] On tools, I intend to be generous. The Appellant works with his hands and with air-driven tools. Anyone who works around shops, whether it is an auto repair shop or any place where power tools are used, knows that tools get hard use and wear out quickly. Because the cost of repairing them is prohibitive and where he was allowed only a small amount in 2001 and in 2003, and no amount in 2002, strictly on the basis of his vouchers, I am going to allow him $800 a year. I do not know how a person can use power tools day after day, week after week, and not be required to replace and repair them, and power tools are expensive.

[27] The amount claimed for a cell phone in 2001 was $385, and in 2002 was $963. In 2003, the Appellant did not claim any amount for whatever reason. There is a certain lack of consistency in the expenses because in some years, like the third year, he claimed property taxes which are not claimed the year before. I think he would need a cell phone for his job and would allow an arbitrary amount of $30 a month or $360 in each year. Lastly, for work clothes, he says it would cost about $150 for a standard pair of coveralls, and I can see you would need at least two pair a year, so I allow $300 a year for coveralls. Therefore, in summary, in each of these three years, I would allow the Appellant to deduct $525 for health and accident insurance; $550 for the fees of the accountant because he is an independent contractor; $800 for tools; $360 for a cell phone; and $300 with respect to work clothes.

[28] In the 2003 taxation year, there is a troubling amount in conflict with respect to GST. To Mr. Bartleman's credit, he pointed out the inconsistency in the way HQ has treated the GST, and this is where the fine line between employee and independent contractor gets foggy. As everyone knows, if you are an employee, there is no GST on your wages, but if you are a professional person, like an engineer or an accountant or a lawyer sending out bills, there is GST. The same applies to independent contractors like the Appellant where he is wearing an independent contractor hat. He is required to charge GST for his services.

[29] So if his invoice for two weeks is a thousand dollars, he has to charge $70 GST. There has been some confusion as to whether HQ pays him both his earnings and the GST and leaves him to remit the goods and services tax or withholds GST to pay itself. The Appellant's evidence is that he pays it himself since HQ pays him whatever he invoices them, and then he invoices them for GST, and once they have paid him for that amount, he remits the amount, which would give him entitlement to input tax credits. That is the best evidence we have on it. But clearly from 2001 and 2002, the evidence is that in one year, HQ lumped the GST into his total earnings on the T4 slip, which would make it appear that his earnings were higher by 7% than what they should have been. And then there is also evidence in 2001 and 2002 and that amount was backed out where necessary in the computation of his income for income tax purposes. But in 2003, this is confusing because Exhibit R-1, Tab 5 shows in the T4 that his earnings are $59,496, but apparently his return was e-filed for that year, and he did not file a conventional return signed by himself. Therefore, sometime later, according to Mr. Bartleman's submission, Revenue Canada asked for a statement of his business activities and expenses.

[30] Included in Exhibit R-1, Tab 3 is a statement of business activities apparently prepared by Active Accountants, the firm that does the Appellant's tax returns, in which they show this gross amount of $59,496 as his total income, sales, commissions and fees. And that is the amount taken from the T4 slip for 2003. And they then deduct the amount of $3,892 as the GST and leave him with gross income of $55,603. As counsel for the Respondent pointed out, the document in Exhibit R-1, Tab 3 is not necessarily reliable, because it was not part of the overall return and appears to be made up at some time after the Appellant's return was filed.

[31] On the other hand, according to the Reply to the Notice of Appeal, the Appellant did report income of $55,603 in 2003. I have to assume that when his income tax return was prepared, the document which appears at Tab 3 in Exhibit R-1 was in existence and someone at Active Accounting had actually done that computation and reduced the Appellant's gross income to $55,603, indicating he was entitled to the deduction of the GST. Although in the Reply, the Minister assumed that during the year 2003, the Appellant received gross fees of $59,496. I think that assumption is wrong. We certainly do not have the best evidence in the world on this but again, I am inclined to give the taxpayer a break because he has been in the hands of people who prepare his tax returns and have given him very questionable advice. I want to give him the benefit of the doubt so that, for the year 2003, I would permit the Appellant to deduct an amount for GST. Because the Minister thought that the amount on the T4 was his gross earnings and it is in conflict with the statement that

appears in Exhibit R-1, Tab 3, I am going to grant to the Appellant in that one year a GST deduction of $3,892.

[32] The appeal will, therefore, be allowed in part. In substance, the vast majority of his claimed expenses will be disallowed. I am going to uphold the assessment in that regard, so that of the $25,000 or $30,000 he claimed, he will be permitted to deduct a relatively modest amount. As I have indicated on those five items, it appears that he will be entitled to deduct about $2,535 and then in the last year, 2003, he will get the very large deduction for GST.

[33] In closing, I would simply add something I have implied and that is I am critical of the fact that people that are advising the Appellant would encourage him to think that he is entitled to deduct as expenses amounts that are more than 40% of the gross income. They ought to, as a practical matter, know that he was an employee travelling to one work location, if not in law and if not within the terms of the way he was filing his return. He was regarded as an independent contractor, but the Appellant has so many of the badges of employment about the work that he performs, the location where he performs it, that any person engaged in the business of advising taxpayers ought to have been more cautious in what they advised him was available for deductions on his behalf.

Signed at Ottawa, Canada, this 10th day of December, 2008.

"M.A. Mogan"

Mogan D.J.

CITATION:	2008 TCC 669
COURT FILE NO.:	2006-1264(IT)I
STYLE OF CAUSE:	RAHIM ZOLGHADR and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 23, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice M.A. Mogan
DATE OF JUDGMENT:	December 10, 2008

APPEARANCES:

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