Docket: 2008-1366(IT)I

BETWEEN:

LLOYD FREAKE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 9, 2009,
at Corner Brook, Newfoundland and Labrador

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

Agent for the Appellant:	Fred Cole
Counsel for the Respondent:	Jill Chisholm

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2006 taxation year is allowed, and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to deduct other employment expenses in the amount of $23,758.43 in computing income.

Costs are awarded to the Appellant in the amount of $500.

The $100 filing fee is to be refunded to the Appellant.

Signed at Ottawa, Canada, this 3rd day of November 2009.

"F.J. Pizzitelli"

Pizzitelli, J.

Citation: 2009 TCC 568
Date: 20091103
Docket: 2008-1366(IT)I

BETWEEN:

LLOYD FREAKE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Pizzitelli, J.

The Issues

[1] The issue to be decided in this appeal is whether the Appellant is entitled to deduct employment expenses under subsection 8(1) of the *Income Tax Act* (the "*Act*") totalling $24,303 in relation to board and lodging and other travel expenses. If he is, then it must be determined whether he excluded any allowances received on account of these items from income. If he is not allowed to deduct the above expenses, then I must determine whether the Appellant can exclude any amounts from income under subsection 6(6) of the *Act* in respect of the 2006 taxation year, to the extent any were included in income. There is also a minor issue dealing with the quantum of union dues that are deductible.

The Background

[2] During the 2006 taxation year, the taxpayer, a journeyman lineman and a resident of Twillingate, Newfoundland and Labrador in Canada, worked in the United States for the entire year, five months in the State of Virginia where he earned $38,334.59 U.S. and seven months in the State of California where he earned $124,786.79 U.S. Based on the average exchange rate in effect in 2006, his earnings

in U.S. funds are equivalent to $184,994 CDN. The taxpayer deducted a total of $24,303 for employment expenses and $5,890 for union dues, of which only $545 was permitted for employment expenses and $4,408 for union dues.

[3] The Appellant is a member of the International Brotherhood of Electrical Workers Union with expertise and skill in the technical planning and hanging and repair of hydro electric lines over long distances. He has worked in Canada and extensively in the United States over the past 14 or so years and testified that he chose to respond to requests to work in the United States because of the advance nature of steel tower use there and his feeling such expertise would prepare him for such future work in Canada as well as the need to work in that field. The running of hydro electric lines over long distances and different topographies is undertaken by large specialized companies and obviously in different project locales where contracts are tendered and obtained. The nature of the work is you go where it is. The Appellant had a detailed memory of the places he worked at and stayed during his tenure both during the several years before the 2006 year in question and during that year which was readily evident on cross-examination by the Respondent. On a project-by-project basis, the Appellant either received a call from the contractor inviting him to take the position or heard about it from friends and colleagues in the same line of work and applied for the position.

[4] The Appellant would leave his home in Newfoundland and Labrador and either fly or drive, at his expense, to the project office of the contractor, which was usually in the proximity of the project and which could have been a permanent office of the contractor or a temporary project office, depending on the locale. After completing the necessary paperwork, including driving to the nearest Union Local Office to transfer his ticket to that jurisdiction in order to work there, the Appellant would find accommodations, usually in a small motel or lodge in the area where the work was to be performed. He would report to the site trailer which acted as a temporary site office for the site supervisor during completion of the project. As progress was made in running the overhead lines over distances, the site trailer would be moved along the line.

[5] It was the Appellant’s responsibility to report to the site trailer everyday, wherever it was at the time, and from there he would be transported by company vehicle to the specific place of work along the line for the day. If he had his own truck, as was the case in Virginia and California, he would drive his own vehicle to the site trailer. As the site trailer moved, he testified he would often change motels to a nearer site to shorten the route of transportation to and from the trailer.

[6] Between projects, he would fly back home as he also did at Christmastime to the residence he maintained in Twillingate, Newfoundland and Labrador to join his wife and family at his own expense. He was responsible for arranging and paying for transportation to and from his home in Newfoundland and Labrador and for his board and lodging while at the work site.

[7] The only employer in the United States the Appellant worked for in 2006 was PAR Electrical Contractors, Inc. who had head offices in Kansas City, Missouri and maintained several branch offices throughout the United States and temporary offices for projects outside those areas in a town near the work area which involved long distances through which the hydro wires had to be run. As mentioned, temporary trailers would be stationed near the actual work areas and moved along the lines as the project progressed.

[8] In the taxpayer's tax return for 2006, a Statement of Employment Expenses schedule identifies the expenses that were subsequently disallowed by Canada Revenue Agency ("CRA"), including $7,756.66 for Food and Beverages and $16,001.87 for Lodging. I have already made reference to the disallowance of $1,482 as part of the union dues claimed. Included in the gross income of $184,994 in that return was an amount the Appellant claims was an allowance on account of board and lodging, which is in dispute and will be dealt with later.

The Positions of the Parties

[9] The Appellant's position is that these deductions represent the value of board and lodging and transportation directly incurred by the Appellant taxpayer in the course of his employment for which he was required to carry out his duties away from the employer's place of business, which his Agent described as a special work site, all of which are reasonable and hence are deductible. In the alternative, if they are found not to be deductible, the Appellant states that he received allowances for living expenses from his employer which he included in income and hence they should then be excluded from income under subsection 6(6) of the *Act*.

[10] The position of the Respondent on the issue of deductibility is that the Appellant was not required to be away from the employer's place of business because the employer's place of business was the trailer he reported to daily. Since the Appellant had voluntarily agreed to work in those locales, he effectively moved to those locations and hence the expenses incurred were personal living expenses. These positions were made in argument or led into evidence by the witness for the Respondent who, in explaining why he did not review or follow-up on

evidence regarding receipts sent to CRA for board and lodging and transportation from Newfoundland and Labrador to and from the project locale, found them to be irrelevant since he was proceeding on the basis the expenses were personal in nature. No other evidence was led by the Respondent on the deductibility of these expenses. The Respondent pleaded no facts assumed by it relating to paragraph 8(1)(*h*) of the *Act* regarding the deductibility of the expenses in the context of travel expenses within that section other than they were not incurred. As mentioned, the Respondent simply assumed those deductions were personal living expenses and focused its argument towards the second relief sought by the Appellant, that is, that if the expenses were not deductible, then the taxpayer in effect did not receive or claim any allowances in income within the meaning of subsection 6(6) of the *Act* and accordingly could not again exclude these amounts from income. This is clear from the relief sought by the Respondent in paragraph 13 of the Amended Reply which reads:

> 13. He submits the Appellant did not receive or enjoy any amounts ***that were included in his 2006 income,*** in respect of his employment in the United States that was the value of, or an allowance in respect of expenses the Appellant incurred for his board and lodging while living and working in the United States during the 2006 taxation year. Therefore the Appellant is not entitled to exclude any amounts from the $184,994 of income he reported pursuant to subsection 6(6) of the *Act.*

[11] The only relevant facts in dispute can be found in paragraphs 2, 3, 4 and subparagraph 10(i) of the Amended Reply.

[...]

> 2. He denies the Appellant's work required him to be away from his principal residence for at least 36 hours.
>
> 3. He denies the Appellant performed his employment duties at a *special work site*.
>
> 4. He denies $24,038.88 represented the value of board and lodging.

[…]

10. […]

OTHER MATERIAL FACTS

The Minister now wishes to rely on the following:

(i) the Appellant did not receive any allowances ***that were included in his income*** from his employer in respect of any expenses that the Appellant incurred during the 2006 taxation year; and

[…]

Analysis

[12] In examining the first issue, being whether the expenses above described are deductible, the relevant section is paragraph 8(1)(*h*) of the *Act* which reads as follows:

> 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), (vi) or (vii), not included in computing the taxpayer's income for the year, or

(iv) claims a deduction for the year under paragraph (*e*), (*f*) or (*g*);

[…]

[13] None of the exceptions are applicable on the facts here, including the exception in subparagraph 6(1)(*b*)(vii), since the nature of expenses claimed were not in relation to travelling away from the site to which the Appellant normally reported, but in travelling to and from the work location from Newfoundland and Labrador and maintaining board and lodging at the site.

[14] In regard to this first legal issue, I do not agree with the Respondent's position. In my view, the Appellant has met the conditions for deductibility in paragraph 8(1)(*h*) and the evidence clearly establishes that he was required to carry out the duties of his employment away from the employer's place of business which is the first condition to be met.

[15] Clearly, the Appellant was a resident of Newfoundland and Labrador, Canada and his residency in Canada is an assumption of the Minister in paragraph 10(b) of its Amended Reply. I accept the evidence of the Appellant that his principal residence was in Twillingate, Newfoundland where his family ordinarily resided and from which he left and returned to in relation to the projects in the United States.

[16] The Respondent's argument that when the Appellant voluntarily chose to go to a new location meant he was in fact maintaining another residence there makes no sense in the circumstances. The Respondent relied on the case of *Douglas v. The Queen*, 90 D.T.C. 6597, where the taxpayer travelled to a different city at the request of his employer to open a new office and then later accepted a permanent position at that office at which time the Court found he was no longer required to carry out his duties away from the employer's place of business. Those facts do not apply to the case at hand where there is no evidence the position of the Appellant ever became permanent at any place of business of the employer. The evidence is clearly that the Appellant was required to undertake his duties, presumably only as long as the project remained uncompleted, if he even chose to stay that long, at a field location which moved as the project moved along towards completion of the hydro line installations, and then returned home. There was no permanent position to accept and none was offered.

[17] In addition, the Respondent also relied on *Munroe v. The Queen*, [1992] T.C.J. No. 281 (QL), where the taxpayer travelled to Toronto from Halifax to work on a single construction site where a complete site office was found to be the employer's

place of business and hence the taxpayer was found not to be required to be away from the employer's place of business. That case is also distinguishable from the case at hand where the work performed here was not at a fixed site, but in a larger geographical area through which the work progressed and in which a movable temporary trailer, described as the supervisor's office, was moved progressively through the large work area as work progressed. I do not accept that a movable trailer, which served the purposes of a daily staging area rather than a site office in the context of the *Munroe* case, was the employer's place of business. In addition, the evidence was that the employer maintained its head office in Kansas City, Missouri and satellite offices at various locations throughout the United States, none of which were the location of the projects where the work was actually performed, and to which, in the case of the California project at least, the Appellant was required to report to do the paperwork only before going on to the site trailer at the temporary field location, further evidencing he was away from the employer's place of business.

[18] Secondly, the evidence is clear and not disputed that the Appellant was responsible for finding and paying all of his own board and lodging expenses as a condition of his employment.

[19] Finally, in *Champaigne v. The Queen*, 2006 TCC 74 and *Dionne v. The Queen*, 2006 FCA 79, in similar factual situations, both this Court and the Federal Court of Appeal have found that the taxpayer is entitled to the deductions pursuant to paragraphs 8(1)(*h*) and (*h.1*), the latter paragraph in connection to motor vehicle expenses, and I am bound by the Appellate Court's decision on this matter. I might add, however, that unlike the above cases, the nature of the field location here is even less permanent than the site offices in those cases, being always literally on the move, and hence, falls even more easily within the scope of those paragraphs.

[20] Having found that the Appellant is entitled to claim reasonable travel expenses within the meaning of subsection 8(1) above, I must determine whether the Appellant included any amounts received from its employer the value of which was for board and lodging, in income; as a taxpayer cannot, as the Respondent pointed out, have the benefit of both the deduction and not include any amounts it may have received on account of those expenses as reimbursement or allowance in income as required under general paragraph 6(1)(*b*) of the *Act*.

[21] The main assumption to be rebutted by the Appellant is that pleaded in subparagraph 10(i) of the Amended Reply, that the Appellant did not receive any allowance that was included in his income. If the Appellant is able to satisfy on a balance of probabilities that it did include any amount in income, then it would

successfully rebut this presumption and it would be for the Minister to prove otherwise.

[22] The Respondent relied on a letter requested from the employer by Ford Hayden, a Rulings officer with CRA, who took over from the Rulings officer who actually made the ruling on this matter and who was not available to testify. Mr. Hayden became involved with the file only after the appeal had been filed. Mr. Hayden testified he contacted the employer to make inquiries on the subject matter of the allowance and obtained a letter dated September 22, 2009, stating "… in 2006, Mr. Freake was paid $163,121.38 in regular wages. ... Mr. Freake received a total of $10,171.32 in reimbursements. This includes a weekly per diem to cover living expenses while working in Wyoming. Payments were $510.00 per week for seventeen (17) weeks and $340.00 for a partial week. …"

[23] The obvious problem with the evidence is that during the period in question both sides agreed he was in Virginia and California and not in Wyoming so, apart from constituting evidence the employer did otherwise pay weekly per diems or allowances to cover living expenses, this evidence is of little use. Mr. Hayden acknowledged as much on cross-examination and confirmed he made no other inquiries to question the discrepancy.

[24] The more credible evidence on the matter was elicited from Mr. Hayden on cross-examination when he was asked to verify the calculation of the regular wages totalling $163,121.38, which was referred to in the said letter. These funds are of course in U.S. funds and exactly match the amount included in income by the Appellant in his Canadian tax return, which after giving effect to the exchange rate totals $184,994. The agent for the Appellant directed Mr. Hayden to the facsimile dated August 28, 2008 from PAR Electrical Contractors, Inc.'s head office which lists the hours worked by the Appellant for the entire 2006 year and gross wages, deductions and net pay. Pages 4 and 5 of the facsimile show the same weeks of work and gross wages but identify the weeks as being either worked in Virginia or California. After applying the rate of pay identified per hour in the pay stub for the final period in 2006 to the hours worked in the pay stub, which equalled the same hours worked in the fax summary above, Mr. Hayden calculated for the Court that the regular wages for the pay period totalled $1,710.80 and not the gross of $1,910.80 shown on the fax summary. The difference was exactly $200, being the same amount identified on the pay stub as the "regular other" item which is defined on page one of the facsimile as meaning the per diem. In other words, the weekly allowance the Appellant alleged he received while in California. In fact, the result is the same if the same calculations are applied to each of the 28-week periods worked in California.

Accordingly, I am more than satisfied based on the above evidence and his oral testimony that the Appellant has rebutted the Minister's assumption on this matter and that the Appellant included any living allowance received into income in accordance with subsection 6(1) of the *Act*.

[25] The last issue to be dealt with is the quantum of expenses. The Minister denies $24,038.88 represented the value of board and lodging. I believe the amount claimed in the Notice of Appeal was $24,303.88 and that the Minister mistranscribed the number. He is correct in that statement to the extent that the amount claimed by the Appellant for board and lodging was $23,758.43 as shown in his tax return filed for the year, the difference being the motor vehicle expense deduction of $545.45 which is not in dispute. The claimed amount is comprised of $16,001.87 for lodging and $7,756.56 for food and beverages.

[26] The Appellant submitted detailed lists of itemized travel expenses including lodging, airline travel and phone charges totalling $15,847.37 in Canadian funds versus the $16,001.87 claimed, a small difference of $154.50, which is more than covered by an airline item of $186.95 which seemed to be missing from the list summary. The Appellant submitted evidence of payment of the above expenses by credit card statements and receipts from motels, which I accept were forwarded to CRA. Mr. Hayden, by his evidence, admits to not having reviewed these items as he indicated they were not within the scope of the investigation for which he was brought in on to replace the actual Rulings officer who ruled on the matter. No actual receipts for food and beverages were submitted into evidence; however, I accept the position of the Appellant that they were expended and they seem more than reasonable considering the fact they represent such items for almost an entire year. Accordingly, I accept the Appellant has expended the full amount as claimed, notwithstanding that some of the expenses included in the line item for lodging on the return included travel to and from the projects which are obviously within the ambit of paragraph 8(1)(*h*) of the *Act*.

[27] The only other issue to be addressed is the discrepancy in union dues claimed by the Appellant of $5,890, of which he was denied $1,482. The amount allowed by the Minister coincides with the union dues and deductions shown in the last pay stub of the Appellant. The Appellant did not adduce any evidence to support the additional claim, and accordingly, the Minister's position on union dues is upheld.

[28] The appeal is allowed with costs of $500 awarded to the Appellant and the reassessment is referred back to the Minister of National Revenue for reconsideration

and reassessment on the basis that in computing income, the Appellant is entitled to deduct other employment expenses in the amount of $23,758.43.

Signed at Ottawa, Canada, this 3rd day of November 2009.

"F.J. Pizzitelli"

Pizzitelli, J.

CITATION:	2009 TCC 568
COURT FILE NO.:	2008-1366(IT)I
STYLE OF CAUSE:	LLOYD FREAKE and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Corner Brook, Newfoundland and Labrador
DATE OF HEARING:	October 9, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice F.J. Pizzitelli
DATE OF JUDGMENT:	November 3, 2009

APPEARANCES:

Agent for the Appellant:	Fred Cole
Counsel for the Respondent:	Jill Chisholm

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