Docket: 2009-456(IT)I

BETWEEN:

MICHAEL NIEMEIJER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 25, 2009 at
Vancouver, British Columbia

Before: The Honourable Justice L.M. Little

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Selena Sit

AMENDED JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2006 taxation year is **allowed**, without costs, **and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment** in accordance with the attached **Amended** Reasons for Judgment.

Signed at Vancouver, British Columbia, this 18th day of **January** 20**10**.

"L.M. Little"

Little J.

Citation: 2009 TCC 624
Date: 20**100118**
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BETWEEN:

MICHAEL NIEMEIJER,

Appellant,

and

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Respondent.

AMENDED REASONS FOR JUDGMENT

Little J.

A. FACTS

[1] The Appellant is a commercial pilot employed by KLM Royal Dutch Airlines ("KLM"). The Appellant serves as the First Officer when he flies for KLM.

[2] KLM uses Schiphol Airport ("Schiphol") in Amsterdam, The Netherlands, as its main base of operations.

[3] KLM does not stipulate where its pilots have to live. However, KLM does stipulate that its pilots must report to Schiphol at appointed times. All KLM flights flown by KLM pilots originate at Schiphol and all flights terminate at Schiphol.

[4] The KLM pilots must also be present at Schiphol to attend training or refresher courses. All KLM pilots must be on standby at Schiphol at times and they must report for medical checkups at Schiphol as required by KLM.

[5] On or about May 10, 2006, the Appellant moved with his family from The Netherlands to Canada as a landed immigrant. The Appellant and his family reside in Vancouver, British Columbia, Canada.

[6] As of May 10, 2006, the Appellant has been a resident of Canada.

[7] In order to be able to have a place to live when he reports for his employment duties at Schiphol, the Appellant maintained a small apartment in Hoofddorp (close to Schiphol) for which he paid a monthly rent. The Appellant shares this apartment with other KLM pilots. The Appellant determined that his share of the rent paid for the apartment in 2006 (from May 10 to December 31, 2006, was $1,530 Cdn).

[8] KLM reimburses the Appellant with per diem payments and organizes and pays for hotel expenses while the Appellant is away from Amsterdam. However, KLM does not reimburse the Appellant for any costs incurred by the Appellant while he is in Amsterdam before or after flights or for the extra work activities (i.e. simulator sessions, medical checkups and while the Appellant is on standby).

[9] KLM deducted various amounts from the Appellant's income such as taxes, pension contributions, etc. KLM also deducted Dutch Health Insurance premiums. The Appellant determined that the proportionate share of the premium paid for Dutch Health Insurance from May 10, 2006 to December 31, 2006 was $1,775 (Cdn).

[10] The Appellant filed an income tax return in The Netherlands for the 2006 taxation year.

[11] The Appellant also filed an income tax return in Canada for the period commencing May 10, 2006 to December 31, 2006.

[12] When the Appellant filed his 2006 Canadian income tax return, he claimed the following amounts as deductions:

1. Share of rent for apartment in Hoofddorp - $1,530 Cdn.;
2. Premium paid for Dutch Health Insurance - $1,775 Cdn.**; and**
3. **Pension plan contributions in the amount of $2,666.29.**

(Note: Some additional items were claimed by the Appellant on his Canadian income tax return. These other items have either been allowed or the Appellant decided not to claim them.)

[13] The Minister of National Revenue (the "Minister") did not allow the Appellant to deduct the apartment rent of $1,530 (Cdn.)**,** the premium of $1,775 (Cdn) paid for the Dutch Health Insurance **and the deduction of pension plan contributions in the amount of $2,666.29**.

B. ISSUES

[14] Is the Appellant entitled to deduct the following amounts in determining his income for the 2006 taxation year under the Canadian *Income Tax Act* (the "*Act*"):

1. Apartment rent - $1,530 (Cdn.);
2. Premium paid on Dutch Health Insurance - $1,775 (Cdn.)**; and**
3. **Pension plan contributions.**

C. ANALYSIS AND DECISION

Premium on Dutch Health Insurance

[15] **At the commencement of the hearing of the appeal, counsel for the Respondent agreed that the Appellant is entitled to deduct pension plan contributions in the amount of $4,148 for the 2006 taxation year. Counsel for the Respondent also noted that the Appellant was initially denied the deduction of pension plan contributions in the amount of $2,666.29.**

[16] During the hearing, counsel for the Respondent agreed that the premium paid for the Dutch Health Care Insurance was an eligible medical expense pursuant to section 118.2 of the *Act*. However, counsel for the Respondent said that since the premiums do not exceed the lesser of $1,884 and 3% of the Appellant's net income for the 2006 year, there is no amount that may be deducted by the Appellant as a medical expense for that year.

[17] The Appellant said that under the laws of The Netherlands, he was required to pay the premium for Dutch Health Care Insurance. The Appellant said that the premium for health care imposed by the government of The Netherlands was, in effect, a form of tax and therefore he should be allowed to deduct this payment as a Foreign Tax paid in determining his income for the purposes of the Canadian *Act*.

[18] While researching the law on the issues under appeal, I concluded that it was necessary to determine if the Canada-Netherlands Income Tax Convention (the "Tax Convention") applied to the premium paid to obtain Dutch Health Insurance.

[19] By letter dated September 30, 2009, the Court asked the parties to comment on the following questions:

(a) Does the premium paid for Dutch Health Insurance qualify as "wages tax" that is referred to in Article 2 of the Tax Convention?

(b) Are there any provisions in the Canada-Netherlands Tax Convention that would apply in the appeal?

[20] In a letter dated October 13, 2009, the Appellant provided a response to the questions raised in the letter from the Court. In his letter the Appellant said:

> I believe this mandatory deduction does qualify as "wages tax", for the following reasons:
>
> The Dutch Tax Department website explains that the deducted amount is "… an income related contribution." It goes on to say that "The income-related contribution is calculated … (on) the total amount you receive in: Taxable Wages …". This clearly explains that the amount withheld is directly related to one's wage.
>
> …
>
> In summary: The amount deducted is directly related to the wages of the individual. It is compulsory and is not individualized and gets used for the general public welfare. I believe it can therefore be classed as a "wages tax" under the Canada-Netherlands Tax Convention.

[21] By letter dated November 30, 2009, counsel for the Respondent provided her comments to the questions raised in the letter from the Court dated September 30, 2009. In her letter, counsel for the Respondent said:

> …
>
> Article 2(3) of the Convention provides as follows:
>
>> 3. The existing taxes to which the Convention shall apply are in particular:
>> …

(b) in the Netherlands:
- the income tax (de inkomstenbelasting),
- the wages tax (de loonbelasting),
- the company tax (de vennotschapsbelasting),…,
- the dividend tax (de dividendbelasting),
(hereinafter referred to as "Netherlands tax").

The reference in Article 2(3) to "*the*" wages tax is clearly a reference to a specific tax imposed by Dutch law at the time the Convention was entered into. That tax is not the same as the Health Insurance premium in issue.

Direct taxation in the Netherlands is governed by the *Wet op de Inkomstenbelasting* 1964, the income tax law, and the *Wet op de Loonbelasting* 1965, the wages tax law. Wages tax is an income tax deducted at source from employees' earnings. The Dutch Tax Administration confirms that wages tax is "an advance income tax" withheld by an employer and paid to the Tax and Customs Administration. As a result of withholding wage tax, an employee "pays no or less income tax."

The reference in Article 2(3) of the Convention to "wages tax" is clearly a reference to taxes imposed under the wages tax law, the *Wet op de Loonbelasting*.

The income-related contribution for Health Insurance in the Netherlands is imposed under the *Zorgverzekeringswet*, the health insurance legislation. It is a separate and distinct levy from the wages tax imposed under the *Wet op de Loonbelasting*.

The Dutch Tax Administration further states that the national Health Insurance contribution withheld by an employer is distinct from wages tax:

> When effecting payment, the employer/benefits agency usually withholds wage tax and national insurance contributions (together known as payroll tax), *as well as the income-related contribution towards the health care insurance scheme*. The payroll tax is offset against the income tax and the national insurance contributions eventually owed [emphasis added].

It is clear, therefore, that the income-related contribution toward the national health insurance scheme is not the "wages tax" referred to in Article 2(3) of the Convention.

Question 2

No other provisions in the [Tax] Convention apply in this appeal because the premium for health insurance is not a tax within the meaning of the Convention. Article 2 states that the Convention applies only to levies that are "taxes" on income:

> **Article 2 [of the Tax Convention]**
>
> **Taxes Covered**
>
> 1. This Convention shall apply to taxes on income imposed on behalf of each of the States, irrespective of the manner in which they are levied.
>
> 2. There shall be regarded as taxes on income all taxes imposed on total income, or on elements of income, including taxes on gains from the alienation of movable or immovable property, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.
>
> …
>
> 4. The Convention shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The States or the competent authorities of the States shall notify each other of any substantial changes which have been made in their respective taxation laws.

Counsel for the Respondent said, "The Health Insurance Premium is not a Tax":

The Netherlands Ministry of Health, Welfare and Sport indicates that health insurance is part of the Dutch social security scheme:

> If you work and pay income tax in the Netherlands, you are subject to Dutch social security legislation. This means you are obliged by law to take out health insurance. [See: Ministry of Health, Welfare and Sport, "Compulsory health insurance if you work in the Netherlands" (26 October 2009), online: Ministry of Health, Welfare and Sport: <http://www.minvws.nl/en/folders/z/2008/compulsory-health-insurance-if-you-work-in-the-netherlands.asp> at para. 2]

> For tax treaty purposes, social security charges do not generally qualify as taxes. In discussing the OECD Model Convention, upon which most of Canada's tax treaties are based, [Dr.] Klaus Vogel states the following:
>
> > Nor do social security charges qualify as taxes. They are directly connected with the benefit of enjoying the protection afforded by the social security system… [Dr. Klaus Vogel *et al.*, *Klaus Vogel on Double Taxation Conventions*, 3rd ed. (Boston: Kluwer Law International, 1999) at para 29 of page 147]

Counsel for the Respondent said:

> The *Asscher* decision of the Court of Justice of the European Communities (Fifth Chamber) explains the difference between the Netherlands' national health insurance contributions and taxes. That case concerned whether the Netherlands was permitted to take account, by means of a different tax rate, of the fact that a non-resident was not required to pay contributions to the national insurance scheme. The Advocate General's opinion discussed taxation in the Netherlands and recognized that although wages tax and national insurance contributions are collected together in the Netherlands, they are not the same thing:
>
> > [d]irect taxation and social security contributions belong to fundamentally different categories of levy, which are not in any way directly related. The payment of social security contributions forms part of an insurance scheme: it bestows entitlement to specific benefits. The payment of taxes, however, which is unconnected with any insurance transaction, does not give rise to any benefits as such. [See: *Asscher v. Staatssecretaris van Finacikn*, [1996] All ER (EC) 757]]

[22] I agree with the analysis as outlined by counsel for the Respondent in her brief. I have concluded that the premiums paid for Dutch Health Insurance are not "wages tax" within the meaning of the Tax Convention. It therefore follows that the Appellant does not succeed on the first issue.

Rental Expenses of Apartment

[23] Subsection 8(1) of the *Act* provides that except as permitted by this section, no deductions from employment are permitted.

[24] Paragraph 8(1)(g) of the *Act* states:

> *Transport employee's expenses*

> 8.(1)(g) where the taxpayer was an employee of a person whose principal business was passenger, goods, or passenger and goods transport and the duties of the employment required the taxpayer, regularly,
>
> > (i) to travel, away from the municipality where the employer's establishment to which the taxpayer reported for work was located and away from the metropolitan area, if there is one, where it was located, on vehicles used by the employer to transport the goods or passengers, and
> >
> > (ii) while so <u>away</u> from that municipality and metropolitan area, to make disbursements for meals and lodging,
>
> amounts so disbursed by the taxpayer in the year to the extent that the taxpayer has not been reimbursed and is not entitled to be reimbursed in respect thereof;
>
> …
>
> (Underlining added)

[25] Since the Appellant did not incur the rental expenses while travelling away from the municipality or metropolitan area where Schiphol is located, I have concluded that the Appellant is not entitled to deduct the rental payment pursuant to paragraph 8(1)(g) of the *Act*. In support of my conclusion, I refer to the Court decision in *Crawford v. The Queen* (Bowie J.), 2002 D.T.C. 1883. This decision was upheld by the Federal Court of Appeal in *Crawford v. Canada*, 2003 D.T.C. 5417.

[26] In the *Crawford* case, the Federal Court of Appeal said:

> … The context of paragraph 8(1)(g) of the Income Tax Act, which requires that employees be away from their municipality or metropolitan area, necessarily implies that "meals and lodging" must be read conjunctively. The deduction contemplated is only available when there are disbursements for both meals and lodging.

[27] The appeal is **<u>allowed,</u>** without costs**<u>, to permit the Appellant to deduct pension plan contributions in the amount of $4,148. The appeal is dismissed with respect to the other items noted above.</u>**

Signed at Vancouver, British Columbia, this **<u>18th</u>** day of **<u>January</u>** 20**<u>10</u>**.

"L.M. Little"

Little J.

CITATION:	2009 TCC 624
COURT FILE NO.:	2009-456(IT)I
STYLE OF CAUSE:	Michael Niemeijer and Her Majesty the Queen
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	September 25, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice L.M. Little
DATE OF JUDGMENT:	December 14, 2009
DATE OF AMENDED JUDGMENT:	**January 18, 2010**

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Selena Sit

COUNSEL OF RECORD:

Counsel for the Appellant:

Name:

Firm:

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada