

Docket: 2008-3795(IT)G

BETWEEN:

ARTHUR W. WALFORD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on June 8, 2010, at Toronto, Ontario

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Paolo Torchetti

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeals for the 2002, 2003 and 2004 taxation years are dismissed, with costs to the Respondent.

Signed at Ottawa, Canada, this 10th day of December, 2010.

“G. A. Sheridan”

Sheridan J.

Citation: 2010TCC635
Date: 20101210
Docket: 2008-3795(IT)G

BETWEEN:

ARTHUR W. WALFORD,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] The Appellant, Arthur Walford, is appealing the reassessment of the Minister of National Revenue of his 2002, 2003 and 2004 taxation years.

[2] The Appellant was employed in the Office of Budget and Taxation (“OBT”) of the Ontario Ministry of Finance from 1981 to 2005. While he had an office at the OBT, the Appellant was also authorized to work from home where he maintained an office.

[3] The Appellant worked his way up in the department and at all times relevant to this appeal, was working as an information technology manager. As such, his duties were to acquire and test emerging technologies and to test and provide a technology platform for the OBT offices. To fulfill the technology acquisition portion of his job description, the Appellant was issued and authorized to use four purchasing credit cards (“P-cards”).

[4] Although as a P-cardholder the Appellant did not need pre-authorization for any of his purchases, he was bound by the terms and conditions of the P-card issuer; in particular, that the P-card would be used only for purchases consistent with the types of services and materials authorized by OBT management and that it would not be used for personal purchases. As a public service employee P-cardholder, the Appellant was also subject to the *Procurement Directive for Goods and Services*

which contained similar restrictions. In addition, P-cards were to be used only for purchases from merchants designated from time to time by the Government of Ontario and the P-cardholder was to advise the merchant at the time of purchase that the transaction was GST exempt. Receipts were to be kept for all purchases and reconciled against the P-card issuer's monthly statements.

[5] In September 2004, Internal Audit Services conducted a review of the use of P-cards in a number of Ontario government branches. One of the cardholders ultimately selected for detailed review was the Appellant. Internal Audit Services reviewed purchases made by the Appellant between 1997 and 2004 totalling some \$837,853 and concluded that certain items valued at \$83,656 had been purchased either for personal use or were not consistent with the types of services and materials authorized by management ("Non-OTB Purpose Items") contrary to both the P-card issuers' terms and conditions of use and the *Procurement Directive*. Furthermore, the Appellant had failed to keep receipts for all but approximately 10% of the value of the Non-OBT Purpose Items. Invoices ultimately recovered from various merchants also revealed that the Appellant had paid GST on the items, leading to the conclusion that he had not informed the merchants that the purchases were made on behalf of the Government of Ontario and were therefore, GST exempt.

[6] In June 2005, Internal Audit Services produced a report of its findings entitled *Special Review of Inappropriate Use of Purchasing Cards by Cardholder X in the Office of Budget and Taxation*¹ ("Internal Audit Report"). The upshot was that the Appellant was dismissed from his employment; he was also charged and pled guilty to breach of trust.

[7] The police sent a copy of the Internal Audit Report to the Special Enforcement Division of the Canada Revenue Agency thereby triggering the audit which gave rise to the reassessments under appeal. Canada Revenue Agency auditor Darlene Bird was assigned to review the Appellant's 2002 to 2004 taxation years. Ms. Bird testified for the Respondent and was very thorough and precise in the explanation of how the reassessed amounts were determined. Although interviewed by Ms. Bird and invited to provide information to support his claim that the Non-OBT Purpose Items had been legitimate purchases and/or returned to the OBT, the Appellant did not avail himself of that opportunity. Unable to obtain the Appellant's file directly from the OBT or the Appellant's consent for its release, Ms. Bird ultimately based the

¹ Exhibit A-1, Tab B.

reassessments solely on the Internal Audit Report's findings in respect of the Appellant's Non-OBT Purpose Items².

[8] As a result, the Minister assessed the Appellant under subsection 3(a) and paragraph 6(1)(a) of the *Income Tax Act* for additional income equal to the purchase price of items obtained with the P-cards of \$12,056, \$26,565.50 and \$12,782.59 in 2002, 2003 and 2004, respectively:

3. Income for taxation year.

The income of a taxpayer for a taxation year for the purposes of this Part is the taxpayer's income for the year determined by the following rules:

(a) determine the total of all amounts each of which is the taxpayer's income for the year (other than a taxable capital gain from the disposition of a property) from a source inside or outside Canada, including, without restricting the generality of the foregoing, the taxpayer's income for the year from each office, employment, business and property

6. (1) **Amounts to be included as income from office or employment.** There shall be included in computing the income of a taxpayer for a taxation year as income from an office or employment such of the following amounts as are applicable:

(a) **Value of benefits** - the value of board, lodging and other benefits of any kind whatever received or enjoyed by the taxpayer in the year in respect of, in the course of, or by virtue of an office or employment,
...

[9] The kinds of items identified in the Internal Audit Report as Non-OBT Purpose Items included several cameras and photographic equipment, computer gaming equipment, including a Playstation, an X-box and various games; stereo equipment and numerous CDs and DVDs.; cell phones used by the Appellant's wife and daughters; building materials purportedly to be used to renovate a room on the OBT premises; a Maytag fridge which somehow found itself in the Appellant's kitchen; various consumables such as bottled water, snacks and candies; and two window air-conditioning units. Some of these items were returned to the OBT after the Internal Audit Services review began in September 2004. Although the Minister allowed a reduction of \$13,082 in the Appellant's 2005 income tax return for certain other items returned in that year, no reduction was allowed for the value of any of the Non-OBT Purpose Items returned in 2004.

Appellant's Position

² Internal Audit Report, Section 3 and related Appendices.

[10] While acknowledging that he had not been “perfect” in his use of the P-cards, the Appellant rejected the notion that the value of the Non-OBT Purpose Items had been properly included in his income: first, he argued that the Internal Audit Report had wrongly categorized certain legitimate purchases as Non-OBT Purpose Items. He argued further that, in any event, the income assessed ought to be reduced to reflect the value of the Non-OBT Purpose Items that he had returned to the Ministry.

Respondent’s Position

[11] Counsel for the Respondent reminded the Court that the Appellant had the onus of proving wrong the basis of the Minister’s assessment and argued that the evidence presented fell far short of that mark. Counsel invited the Court to draw a negative inference from the fact that although having challenged both the *bona fides* and the accuracy of the Internal Audit Report, the Appellant had not subpoenaed the officials responsible for the Internal Audit Report to challenge its findings. As for a reduction for the Non-OBT Purpose Items returned, counsel contended that in the absence of any evidence as to the value of the items at the time of their return, no such reduction was warranted.

Analysis

[12] Under paragraph 6(1)(a) of the *Income Tax Act*, benefits of any kind whatever received or enjoyed by a taxpayer in a taxation year “in respect of, in the course of, or by virtue of an office or employment” are required to be included in a taxpayer’s income under subsection 3(a). The phrase “benefits of any kind whatever” is so broad that generally, only benefits specifically exempted by the legislation can escape its ambit. Further, an employee’s lack of authorization for a purchase does not remove the benefit received from the notion of “income” as the proceeds wrongfully realized constitute income from an independent, albeit illegal, source rather than income from employment.³ The jurisprudence shows that “many cases have established the principle that the proceeds of crime or an illegal activity will have the character of “income” for the purposes of the *Income Tax Act*.”⁴ In *R. v. Poynton*, the Ontario Court of Appeal affirmed that the benefits sought to be taxed did not accrue to the

³ *Hughes v. Canada*, [1996] T.C.J. No. 427 (T.C.C.) (QL) at paragraphs 9-10.

⁴ *Erdelyi v. Canada*, 2003 D.T.C. 522 at paragraph 13. (T.C.C.).

taxpayer nor were they conferred upon him as an employee of the company, but as a thief.⁵

[13] Given the wording of the legislation and its interpretation in the jurisprudence, the Appellant faced a particularly heavy evidentiary burden. In my view, he failed to provide sufficient evidence to establish that the findings of the Internal Audit Report, the document upon which the Minister based his reassessments, were incorrect. He did not show that the Non-OBT Purpose Items were purchased as part of his authorized employment duties rather than for his own personal benefit and did not prove the value of Non-OBT Purpose Items ultimately returned to the OBT after the Internal Audit Services investigation began.

[14] The Appellant's case rested on his own testimony and that of three former colleagues he had subpoenaed, supervisor Tom Sweeting and two co-workers, Christina Soleman and Brenda Kershaw.

[15] Turning first to the testimony of the subpoenaed witnesses, their evidence, while generally credible, did not support the Appellant's allegations of inaccuracy in the Internal Audit Report or that the Non-OBT Purpose Items had been purchased for legitimate OBT use. While acknowledging that many at OBT, himself included, were guilty of not having respected the government's P-card usage policies, Mr. Sweeting confirmed that he had been consulted by officials during the Internal Audit Services review and that he did not dispute the findings regarding the Non-OBT Purpose Items. He also rejected the Appellant's suggestion that its findings were the result of political or departmental interference.

[16] As for Ms. Soleman and Ms. Kershaw, they corroborated the Appellant's testimony that he was not the only one that had misused his P-cards, that there was poor control of OBT inventory, that items often "went missing" and that snacks were often provided for the IT employees. However, when it came to the issues under appeal, they had no personal knowledge of the circumstances under which the Appellant purchased the Non-OBT Purpose Items or once obtained, what he did with them.

[17] The weakest link in the evidentiary chain, however, was the Appellant himself. Given that he did not call any of the officials involved in the Internal Audit Report to challenge the finding underpinning the reassessments, proving his allegations of inaccuracy in the Internal Audit Report depended largely on his personal credibility. I

⁵ 72 D.T.C. 6329 at page 6336.

regret to say I did not find the Appellant particularly believable. In addition to being generally evasive and self-serving in his testimony, the Appellant did not seem to grasp the essential wrongfulness of his misuse of the P-cards. In saying this I am mindful of the fact that the issue before me is the correctness of the Minister's assessment, not a reconsideration of the criminal charges against him. My point is that the force of his evidence in respect of the kinds of items he purchased, their intended use, what ultimately became of them and their value upon their return to the OBT was significantly weakened by his tendency to blame his own misconduct on the failure of his supervisors to keep a closer eye on him, to impute improper motives to the Internal Audit Report officials and to attribute inconsistencies in his responses during the Internal Audit by citing health problems and stress.

[18] There were numerous discrepancies between the Appellant's evidence and the findings in the Internal Audit Report. For example, the Appellant testified that many Non-OBT Purpose Items had actually been used at the OBT office for training or experimental IT purposes; according to the Internal Audit Report, however, they had been found at the Appellant's home when the Ministry sent a moving van to retrieve them, including Stinger Speakers/Farad Capacitors; a Sony 27" TV; a Bose Radio (the Appellant said it had been kept under his desk in his OBT office from its time of purchase March 2003; the Internal Audit Report states it had been located in the Appellant's home from date of purchase until December 2004, three months after the Internal Audit had begun, and does not list it as an item later collected from his Appellant); a Panasonic 14" LCD TV; a Polk Surround Sound Speaker System; a JVC DVD/VCR Unit (as with many items, however, there are no serial number on the receipt making it impossible to confirm that the item purchased was the exact item returned); four Sony Walkmans; a Harman/Kardon Receiver; Mission Speakers; Nakamichi Speakers; Pioneer DVD Recorder; and several DVD's. The nature of the items, their number and duplication looks highly suspicious. Equally dubious, the Appellant's justification for keeping such items at his home: "for security reasons" given the poor inventory control at the OBT and the tendency of things to go missing.

[19] Often, his explanations simply defied belief; for example, his story of having purchased materials at Home Depot for the purpose of renovating a storage room located in the OBT building for IT use. Anyone with even a passing knowledge of government operations would be skeptical of the Appellant's assertion that he personally and without authorization from the department responsible would be permitted to renovate a portion of a government building. According to his version of events, his intentions were good; he hoped to save the \$50,000 cost estimated by government officials by doing the work himself for only \$3,000 or \$4,000; his actions, however, fell short of the mark. Notwithstanding his original estimate, the

Appellant ended up spending \$8,000 of taxpayers' money to acquire materials, including hardwood flooring, which ultimately "went missing". He admitted no renovations were ever made to the storage room.

[20] Equally incredible was his justification for having bought several thousand dollars' worth of computer gaming equipment and games, supposedly for the purpose of researching the technology for the OBT. As silly, his story of having to acquire and maintain a vast library of movies for departmental use, including such stellar titles as *Cheech and Chong* and *Jackass*. It is also difficult to reconcile the Appellant's justification for their purchase that such items were intended to be available to officials who had to travel in their work with his admission that the movies made their way back to the OBT only after the Internal Audit Services investigation located them in his home.

[21] All in all, the Appellant failed to convince me that any of the Non-OBT Purpose Items were properly purchased within the scope of his employment duties. Whatever his intentions when purchasing them, the evidence points to the conclusion that they ultimately ended up in his possession where he benefited from their use. The Internal Audit Report was prepared shortly after the investigation by officials who, on the face of it, would have no reason to fabricate their findings. There was no evidence that the Internal Audit Report was unreliable.

[22] There remains, then, the question of whether the Appellant is entitled to a reduction of the income assessed in respect of certain Non-OBT Purpose Items returned to the Ministry. It is clear from the Appendices to the Internal Audit Report that some of the Non-OBT Purpose Items were returned. The problem is, however, that the Appellant failed to provide sufficient evidence of the value of these goods at the time of their return. He made no estimate of their value in his direct evidence. He did not call an expert to testify to their value. Had he been more credible and had he provided details of their use and its duration, I might have been able to estimate a value based on the original purchase prices set out in the Internal Audit Report balanced against the nature of the item and the length of its use by the Appellant. As it is, I do not think such an approach would be appropriate. I note as well that in justifying passing on government-purchased cell phones to his family members and keeping digital cameras purchased with his P-cards for his own use, the Appellant testified, on more than one occasion, that such items were outdated within six months to a year. If I take the Appellant at his word, then such things would have been equally without value when returned to the OBT. As for the returned video games, CDs and DVDs often cited by the Appellant, two minutes at a garage sale will provide a pretty accurate assessment of the worthlessness of such items once used.

[23] For the reasons set out above, the Appellant has failed to rebut the assumptions upon which the Minister based his reassessments. Whether as benefits acquired by virtue of his employment or as income from an illegal source, the amounts assessed by the Minister were properly included in his 2002, 2003 and 2004 taxation years. The appeals from the reassessments are dismissed, with costs to the Respondent.

Signed at Ottawa, Canada, this 10th day of December, 2010.

“G. A. Sheridan”

Sheridan J.

CITATION: 2010TCC635

COURT FILE NO.: 2008-3795(IT)G

STYLE OF CAUSE: ARTHUR W. WALFORD AND
HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 8, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice G. A. Sheridan

DATE OF JUDGMENT: December 10, 2010

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Paolo Torchetti

COUNSEL OF RECORD:

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