Docket: 2016-942(IT)I

BETWEEN:

ANGELA CHAO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 20, 2018, at Toronto, Ontario.

Before: The Honourable Gaston Jorré, Deputy Judge

Appearances:

Agent for the Appellant: Marshall B. Sone

Counsel for the Respondent: Kieran Lidhar

JUDGMENT

For the attached reasons for judgment, the appeal made under the *Income Tax Act* for the 2010 taxation year is allowed, with costs in the amount of $200, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to claim a GST rebate of $277.46.

Signed at Ottawa, Ontario, this 2nd day of May 2018.

"Gaston Jorré"

Jorré D.J.

Citation: 2018 TCC 72
Date: 20180502
Docket: 2016-942(IT)I

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ANGELA CHAO,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Jorré D.J.

Introduction

[1] This is an employment expense case. In 2010 the Appellant worked in the film industry as a second camera assistant.

[2] In the year in issue the Appellant worked on five different film or television productions. She was hired separately for each production and signed a contract in respect of each production. The contracts are referred to in the industry as "deal memos".

[3] The only issue is whether the Appellant is entitled to $1,149 in employment expenses claimed in her return for the 2010 taxation year, or any portion thereof.[1]

[4] No T2200 form has ever been produced and one of the subsidiary issues is whether, in the circumstances of this case, there can be an employment expense deduction in the absence of any T2200 form. The discussion of this issue begins at paragraph 83 below.

[1] This was the amount claimed on the tax return and both parties agreed at the start of the hearing that this was the amount in issue.

[5] Another subsidiary issue is: Who was, or who were, the Appellant's employer(s) in 2010?

[6] It is my understanding that there are a number of other appeals with certain similarities before this Court. Apparently the two subsidiary issues also arise in many of those matters and the outcome of this matter may help the parties reach a settlement in those other matters.

[7] As explained below, I have determined that the Appellant worked for five different employers over the course of the year and that a payroll service provider, Entertainment Partners Canada ("EP Canada"), was not her employer.[2]

The Statutory Framework

[8] The *Income Tax Act* (*Act*) has very specific provisions governing the deductibility of employment expenses. The starting point is the opening paragraph of subsection 8(1) of the *Act* which states:[3]

> 8(1) In computing a taxpayer's income . . . from . . . 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:
>
> . . .
>
> [Emphasis added.]

[9] In addition subsection 8(2) of the *Act* provides that:

> (2) Except as permitted by this section, no deductions shall be made in computing a taxpayer's income . . . from . . . employment.

[10] Thus, in order to claim employment expenses it is necessary to show that the expenses fall within one of the specific paragraphs following the opening words of subsection 8(1) of the *Act*.

[11] In this case, the only provisions of the *Act* which could give rise to a deduction are paragraphs 8(1)(*h*) or (*h.1*) and subparagraph 8(1)(*i*)(iii)[4] which provide that:

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[2] "EP Canada" appears to be the operating name of a BC numbered company.

[3] Both in this paragraph and later I am leaving out any wording in the sections that is not relevant to this matter so as to emphasize the key elements of the provisions relevant to this case. The sections are quoted as they read with respect to the year in issue.

8(1) . . .

(*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 . . . employment, except where the taxpayer

(iii) received an allowance for travel expenses that was . . .

. . .

(*h.1*) 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 motor vehicle expenses incurred in the performance of the duties of the office or employment,

amounts expended by the taxpayer in the year in respect of motor vehicle expenses incurred for travelling in the course of the office or employment, except . . .

. . .

(*i*) an amount paid by the taxpayer in the year . . . as

. . .

(iii) the cost of supplies that were consumed directly in the performance of the duties of the . . . employment and that the . . . employee was required by the contract of employment to supply and pay for,

. . .

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[4] The Appellant raised two other provisions of the *Act* that I will deal with briefly in a later footnote to these reasons. They have no application here.

> to the extent that the taxpayer has not been reimbursed, and is not entitled to be reimbursed in respect thereof;
>
> . . .
>
> [Emphasis added.]

[12] Three other provisions are also relevant.

[13] First, with respect to the portions of subsection 8(1) of the *Act* that may be relevant here, a prescribed form T2200 signed by the employer is a precondition to deductibility.

[14] This is set out in subsection 8(10) of the *Act* which reads as follows:

> (10) An amount otherwise deductible for a taxation year under paragraph (1) . . . (*h*) or (*h.1*) or subparagraph (1)(*i*)(ii) or (iii) . . . by a taxpayer shall not be deducted unless a prescribed form, signed by the taxpayer's employer certifying that the conditions set out in the applicable provision were met in the year in respect of the taxpayer, is filed with the taxpayer's return of income for the year.

[15] However, subsection 220(2.1) of the *Act* reads:

> (2.1) Where any provision of this Act . . . requires a person to file a prescribed form . . . the Minister may waive the requirement, but the person shall provide the document . . . at the Minister's request.

[16] Second, as a result of subsection 8(4) of the Act, no meal may be claimed unless the employee was required by his or her duties:

(a) to be away from the municipality and the metropolitan area of the employer establishment to which the employee ordinarily reported for work

(b) for a period of at least 12 hours.[5]

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[5] Subsection 8(4) reads:

> (4) An amount expended in respect of a meal consumed by a taxpayer who is an . . . employee shall not be included in . . . a deduction under paragraph . . . 8(1)(*h*) unless the meal was consumed during a period while the taxpayer was required by the taxpayer's duties to be away, for a period of not less than twelve hours, from the municipality where the employer's establishment to which the taxpayer ordinarily reported for work was located and away from the metropolitan area, if there is one, where it was located.

[17] As a result, in order to deduct an expense, all of the following requirements must be met:

(a) the Appellant must incur the expense,

(b) the expense must be for the purpose of the employment,

(c) the expense must meet the requirements of one of the paragraphs following subsection 8(1) of the Act, including the requirements as to the nature of the expenditure (for example, it must be for travel meeting certain criteria or for supplies consumed) and, in the case of meals, the requirements of subsection 8(4) of the *Act* must be met,

(d) the employment contract must require that the employee pay for the expense,

(e) the expense must not be reimbursed and

(f) a T2200 form[6]

(i) must be filed with the tax return;

(ii) however, if the Minister has waived the requirement to file, the form must be provided at the Minister's request.

[18] The T2200 form is not determinative as to the conditions of employment if the evidence leads to different conclusions.

[19] The Respondent does not really dispute the first requirement, that the expenses were incurred with respect to those items for which there are receipts. The other requirements are in issue.

[6] The Appellant takes the position that this requirement need not be met in the circumstances of this case. I will deal with that issue later in these reasons.

Facts and Analysis

[20] The Appellant testified as well as Sarah Donati, senior payroll manager at EP Canada, Marshall Sone, the Appellant's accountant and representative and Elaine Armstrong, a team leader for litigation in the Ontario region at the Canada Revenue Agency. Some 16 exhibits were filed and the hearing lasted a full day.

[21] The Appellant claimed $1,149 in her tax return as deductible employment expenses.

[22] The Appellant filed Exhibit A-8 which has at the top left the words "T777 Details" showing $3,352 in employment expenses.[7]

[23] There is a 65% difference between the expenses of $3,352 shown on the T777 form produced as Exhibit A-8 at trial and the $1,149 amount claimed in the 2010 tax return.

[24] The Appellant was unable to explain the difference. She did not remember on what basis the amount of $1,149 was claimed in her return of income; she agreed with her representative's suggestion that the $3,352 must have been discounted.

[25] As stated previously, the Respondent did not challenge the fact that the expenditures in respect of which there are receipts in Exhibit A-9 were incurred. Those receipts support the three-page summary found at the beginning of Exhibit A-9. However, the Respondent did contest the deductibility of the expenditures in other respects, including whether they were for employment.[8]

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[7] This does not appear to be the official T777 form; it may be that it is something prepared by tax accounting software in relation to the T777 form. The $3,352 is found at line 3 of the form. It is the sum of line 1 of the form plus $577 shown on the line for accounting fees. The accounting fees are described on the third page of the summary at the beginning of Exhibit A-9 by the words "income tax return". At the line immediately above line 9 of the form there is an amount of $4,660 which seems to be "other expenses claimed"; it is not at all clear where this $4,660 amount comes from. The $3,352 corresponds to the total of the three-page summary at the top of the bundle of documents marked as Exhibit A-9.

[8] While the receipts appear to be largely consistent with the three-page summary, there were some discrepancies. However, as the Respondent stated that it was not challenging the fact that the expenditures were incurred, as opposed to whether they were deductible, and given my conclusions below it is not necessary for me to examine this further.

Who Was(Were) the Employer(s)?

[26] The Appellant takes the position that EP Canada was the employer and presented evidence as to how she sought, but was unable to obtain, a T2200 form from EP Canada. As a result the question of who was the Appellant's employer arises.

[27] In general terms in a contract of employment one person, the employer, hires another person, the employee, to perform work at the direction of the employer. In return the employer pays the employee.

[28] There is no question that an employer can carry out its contractual obligations not only by its employees but also by means of contractors hired to perform certain functions.

[29] Nothing in the evidence suggests that EP Canada hired the Appellant or told the Appellant what work to perform.

[30] It was quite clear from the testimony of Sarah Donati that EP Canada was only a provider of payroll services to production companies. As part of those services EP Canada also prepared and sent the T4s and would prepare records of employment for employment insurance purposes.

[31] The Appellant's testimony was that for each of the five film or television projects she worked on she signed a deal memo. Generic sample documents, including a sample deal memo, were filed as Exhibit A-6.[9] The Appellant did not keep copies of the deal memos she signed.

[32] It is the production companies who hired and paid individuals such as the Appellant to work on the television or film production. They are clearly the employer as can be seen from the following excerpt from the first page of the sample deal memo:

> This Crew Deal Memo (the "**Agreement**") sets forth the terms and conditions of the agreement between Killjoys IV Productions Limited ("**Producer**") and the

[9] See the sample deal memo at the third, fourth and fifth pages of Exhibit A-6. The deal memo is in effect an employment contract; it incorporates by reference much of the union agreement in clause 7 and is also supplemented by some other documents included in Exhibit A-6. These sample documents were not an actual contract entered into by the Appellant in respect of a film or television project; the Appellant testified that the sample was like the documents she signed. The union agreement was filed as Exhibit A-5.

> above-named individual ("**Artist**") for the services of Artist as a crew member on the above-mentioned television series (the "**Production**").
>
> 1. Producer hereby engages Artist to render exclusive services on the Production in the above-referenced position and Artist hereby accepts such engagement. Artist shall render all services required by Producer on and following the Start Date set forth above, as when and where required by Producer. Artist shall comply with all directions, requests, rules and regulations of Producer in connection with Artist's services hereunder, and shall perform such services in a diligent manner.
>
> 2. Artist shall be paid for his/her services hereunder at the Rates set forth above. . . .

[33] There is no doubt that the Appellant was employed by the five production companies, and not EP Canada who was simply paying the Appellant on behalf of the production companies.[10]

The Expenses

[34] I will now turn to the expenses set out in the three-page summary at the beginning of Exhibit A-9.

Travel Expenses and Car Expenses

[35] The expenses under the headings "travel expenses" and "car expenses" total $1,625 and $242 respectively.

[36] Except for an $8 parking expense and another expense of $9 described as "work travel", the rest of the expenses under "travel expenses" are described as "gas for work".

[37] The "car expenses" are all car repair expenses.

[38] In direct examination the Appellant made it quite clear that she did not own a car. She went on to explain that most of the time her mother would give her a ride to or from work although occasionally she would catch a ride with a co-worker. She felt it appropriate that she pay part of her mother's car expenses and the claimed expenses were amounts she paid for her mother.

[10] There is an unusual twist to this issue that relates to one of the assumptions in the original reply to the notice of appeal regarding who the employer is. That particular assumption was subsequently withdrawn on consent. I will discuss this later.

[39] The Appellant was employed for varying periods of time by five different production companies.

[40] Almost all the expenses claimed and listed on the summary at the beginning of Exhibit A-9 are in the first six months of the year.[11] The listing shows only three items in the second half of the year: a car repair bill on August 30, gas on October 20, and an expense described as "iPhone battery ext." on November 19.

[41] There is no logbook or any other evidence that might give some sense of the distances travelled and the reasonableness of the claim if otherwise deductible.[12] The evidence does not disclose how many days the Appellant worked at each location[13] and does not disclose how many days she worked in total.

[42] My first difficulty is that it is not at all apparent how much of the expenditure incurred would properly relate to going to work.

[43] My second difficulty comes from the fact that it is well established that the cost of getting to work is not normally deductible; it is generally a personal expenditure.[14] There are certain exceptions to this in what one might describe as non-standard situations. Nevertheless, in order to determine whether certain travel to work, if any, would be deductible, one needs to have specific factual evidence.

[44] To illustrate a non-standard situation, one might take as an example the case of *Chrapko v. Canada*,[15] where the Federal Court of Appeal dealt with the appeal of an employee of the Ontario Jockey Club who lived in Niagara Falls and worked 75% of the time in Toronto at either the Woodbine or the Greenwood race track and 25% of the time at the race track in Fort Erie. Fort Erie is a fair distance from Toronto but much closer to Niagara Falls than Toronto.[16]

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[11] One wonders if the Appellant only worked for the first half of the year; there is no testimony or other specific evidence to that effect.

[12] Individuals who claim employment expenses should keep organized records to justify the expenditures. As Associate Chief Justice Bowman, as he then was, said in *Chrabalowski v. The Queen*, 2004 TCC 644, in respect of automobile expenses:

> 13 I do not think it is a particularly onerous task for a person claiming employment expenses to keep a record and separate receipts as well as a log book of automobile expenses. . . .

I would also note that the CRA publication T4044 regarding employment expenses contains some useful general guidance about record keeping.

[13] There is one exception: for one company she only worked for a day at one location.

[14] See, for example, *Barry v. Canada*, 2014 FCA 280, a decision of the Federal Court of Appeal, at paragraph 15.

[15] [1988] F.C.J. No. 908 (QL).

[16] Although the case involved the 1977 taxation year, paragraph 8(1)(*h*) as it then read was not different in a way that would affect this aspect of the issue.

[45] Mr. Chrapko claimed his travel expenses to go to work at all three locations. The Federal Court of Appeal did not allow the Appellant to claim the cost of going to work at either of the two Toronto race tracks but did allow the cost of travelling from home to the Fort Erie race track. Although both were in Toronto, there was a fair distance between the Woodbine and Greenwood race tracks.

[46] The evidence here is not sufficient to make any determination as to what quantum of expenditure might relate to travel to work in non-standard circumstances where the cost of going to work may be deductible.

[47] With five different employers one has to look at the question of deductibility with respect to each different employer. We know that there is one employer for whom the Appellant worked for a single day at one location; clearly that is simply travelling to work and not deductible.

[48] With respect to the other employers there were different locations but as I already stated we do not know where or for how long. It appears that overall most of the work was in Toronto. On any given day there was filming at a single location. There is no suggestion that the Appellant had to work in different locations on the same day.

[49] The mere fact of filming in different locations in Toronto on certain days for a particular employer is not enough to make the cost of going to work deductible.[17]

[50] On the other hand, if there is out-of-town filming away from the usual area of filming, and if the travel costs involved are not reimbursed, that might well be deductible. There might also be unusual situations when filming within Toronto as well.[18]

[51] There was reference to filming outside Toronto but little detail. In one production approximately 70% of the filming was in Toronto and 30% outside Toronto. Another production was partially in Toronto and partially outside

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There are other cases involving unusual situations; it is not necessary that I explore them given the limited evidence here. I would note that the case law does not provide bright lines for determining when travel to work is not a personal expenditure and, as a consequence, deductible.

[17] The evidence simply does not disclose how many days were spent at any given location except in one case where the Appellant only worked for one day for one of the production companies.

[18] By way of illustration only, one such unusual situation unrelated to the film or television industry was that of a police officer of the Canine Division who was required to keep his police dog with him when off duty: *Hoedel v. Canada*, [1986] F.C.J. No. 669 (QL).

Toronto. There were two productions entirely in Toronto. Finally, there was a production filmed entirely in Hamilton.

[52] The first two productions are situations where part of the expense of getting to work might be deductible if there were evidence allowing for determination of the related costs, assuming the travel was not reimbursed or provided.[19]

[53] With respect to the film made entirely in Hamilton, Hamilton would be the usual place of employment and travel to work there would not be deductible.

[54] Thus, while there might be potentially allowable travel expenses, given the evidence I am unable to see a basis upon which I could conclude that any particular amount of the expenses was incurred for travel to work in circumstances that could be deductible.[20]

[19] As noted there was some generic evidence as to the employment contracts. No employment agreements were filed. However, typical sample documents were filed (Exhibit A-6) including a blank deal memo that employees would sign. The Appellant testified that this sample was like deal memos she signed.

The Appellant was a member of the International Cinematographers Guild and a sample collective agreement for 2010 was filed (Exhibit A-5). The Appellant's evidence was that the collective agreement was the basis for contracts with employees although there was room for varying certain terms.

With respect to out-of-town travel, section 11 of the agreement deals with travel and accommodation when the work is performed outside of Metropolitan Toronto. It has provisions for transporting people to locations outside of Metropolitan Toronto, see section 11.04. It imposes obligations on the employer to provide or pay for transportation. See also Appendix A to the collective agreement. Unfortunately we do not know if the Appellant benefited from, or could have benefited from, these or similar provisions or not; there was no suggestion during the hearing that she did. There is also no suggestion that she sought to obtain the benefit of such provisions.

[20] There might be other issues that arise from the Appellant's arrangement with her mother but it is unnecessary for me to examine this aspect further.

Food and Meal Expenses

[55] The claim for $108 of food and meal expenses must fail because factually it has not been demonstrated that these expenses meet the requirements of subsection 8(4), i.e. they were consumed while outside of the metropolitan area of the employer's establishment for a period of at least 12 hours.[21]

Accounting

[56] There is a $577 expense for the preparation of an income tax return. It is not entirely clear to me if this is being claimed but I do not see on what basis this could be deducted under any of the provisions of the *Act* that could have application here.

[57] This amount is not deductible.

Telecommunication Services

[58] Amounts were claimed for cell phone expenses ($308), Internet use ($309) and home phone use ($176), a total of $793.

[59] While I am satisfied, based on the Appellant's testimony, that part of her use of her cell phone and a small part of her home phone and Internet use was for work, I have difficulties with the quantum.

[60] The amounts largely correspond to the total amounts of the copies of bills filed.

[61] The Appellant gave examples of her use of her cell phone at work and stated that about half of her use of that phone was for work.

[62] The factual situation is confused by the fact that the Appellant received a cell phone allowance of $5 a day (maximum of $25 a week) while working for two of the production companies but not when working for the other three. Under paragraph 8(1)(*i*) the cell phone expenses related to a particular employer would only be deductible to the extent that they were not reimbursed.[22]

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[21] I also note that the Appellant's testimony was that there were circumstances where breakfast was provided or where a meal allowance was provided, notably for the production in Hamilton.

[22] Or reimbursable.

[63] The evidence does not disclose what amounts were reimbursed and it is impossible to know what net amount might be deductible.[23]

[64] The evidence does not suggest a particular proportion of the total usage of the home phone or the Internet was for work. We do know that the Appellant split the cost of the Internet with her brother.[24]

[65] There might well be some additional telecommunication expenses for work purposes beyond the amount reimbursed, particularly with respect to the cell phone. The Appellant has not demonstrated that any specific amount is deductible. Whatever that amount would be, it is certainly less than a third of $793.[25]

Media and Entertainment Purchases[26]

[66] This heading is the one used by the Appellant and is not very descriptive of these items. An amount of $247 was claimed under this heading for an assortment of items.

[67] Among the items are six smart phone cases,[27] six external battery chargers for an iPhone,[28] an "iPhone battery ext.",[29] an iPod charger and a "DVD for work".[30]

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[23] One would be left to speculation. I note that at $25 a week, six weeks of work for companies that paid the allowance would be about half the expenditure of $308 listed.

[24] From the examples given in evidence, the home phone and Internet usage for work appears to have been modest. To determine a deductible amount even if one had some sort of percentage use in evidence, one would have to consider what the appropriate way of allocating the expense is where, for example, one would have the Internet in any event and the cost is fixed or partially fixed. To take a further example, if one has a home phone in any event and one uses it a little for work without incurring any incremental cost it is hard to see how there could be much, if any, work related expense that is properly deductible.

To give another example, there is an amount claimed for Skype for five months at $2.99 a month. If one looks at the copies of the PayPal transaction printouts supporting this, one sees that it says "Unlimited US & Canada 1 month". If the Appellant subscribed to Skype in any event and mostly used it for personal calls, given the fixed cost and given that occasional work usage has no incremental costs, I am not sure that one should allocate any amount of the cost to work.

Indeed, more generally, below some low level work use, if the use of a particular communication device results in no material incremental work related cost, it may be that no amount of cost should be attributed to work.

[25] This is before taking account of the cell phone allowance.

Given my findings below, it is unnecessary to try to determine a number. The evidence I heard suggested that the work use was essentially talking on the phone and sending emails consisting of text. It would not appear that work would use a lot of data.

[26] The Appellant testified that she received a kit rental allowance. However, her description at the hearing of what was covered by it does not sound like the items claimed under this heading.

[27] These are shown in the three-page summary at the start of Exhibit A-9 as acquired on January 12, March 28 and 29 as well as on May 16, 23 and 27 — the last three also seem to be phone cases although they are described as "silicone case", "hard case" and "leather case". In the summary the dates are out of order.

[68] The Appellant testified that many filming locations were dusty and her phone cases got dirty and as a result she frequently replaced her phone cases.

[69] She also testified that sometimes they would be on location for a very long time and as a result she needed to extend the battery life of her cell phone.

[70] There was no detail as to how the DVD related to work.

[71] Nothing in the evidence explained how an iPod was used for work and, as a result, how an iPod charger related to work.

[72] Much of this category is personal, some of it may be partially related to work and some may be entirely related to work. Whatever might be the amount that properly relates to work it is a sum a good deal less than the $247 claimed.

[73] To sum up what we have examined so far, there is a small amount of expenditure that was related to work. Whatever that amount is, it is not only much less than the $3,352 shown in Exhibit A-9, it is very significantly less than the $1,149 claimed.[31]

Contractual Obligation

[74] While there are many exceptions, the general practice is that employers provide the means by which employees carry out their work. Hence an individual claiming employment expenses needs to demonstrate that this is not the case by showing that the employment contract required the employee to pay certain expenses.

[75] The sample contractual documents filed do not have provisions requiring the employee to pay any particular expenses. This includes the sample union agreement.

[76] While the Appellant testified generally as to the nature of many of the expenses and why she made them, she did not testify to any specific written or

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[28] One was bought on May 19 and five were bought in the same transaction on May 22 — see the PayPal transaction notices of those dates.
[29] I am not sure what "ext." means; it is one of the two most expensive items under this heading at about $53.
[30] The DVD was also one of the two most expensive items at about $53.
[31] Again, as I indicated earlier, given my conclusions below I need not attempt further to determine a number.

unwritten conditions of employment or any explicit understandings that she must pay certain expenses.[32]

[77] The requirement is not whether the expenditures were made. The requirement is that the contract must oblige the employee to pay for the expenses.

[78] However, there are some written provisions which provide for the employer paying certain expenses and other provisions that seem to open the door to the possibility of the employer paying for certain expenses. The Appellant received kit allowances from all five employers and cell phone allowances from two employers.

[79] Section 11 of the union agreement provides that employers shall pay for certain travel expenses outside of Metropolitan Toronto.[33]

[80] The Conditions of Employment and Accounting Procedures in the sample documents may open the door to reimbursement for incremental cell phone costs upon prior approval and for various miscellaneous purchases and costs on approval although it is far from clear what, if anything, would be reimbursed by the employer if it is not set out in the deal memo.[34]

[81] With one exception,[35] the Appellant has not demonstrated that there were any implicit terms of the contract requiring her to pay the expenses in issue.[36]

[82] Given the absence of a contractual requirement apart from the one exception just noted, for that reason alone the Appellant does not meet the requirements of

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[32] There is one case where I am satisfied there was an implicit understanding; see below.

[33] Exhibit A-5; section 11 generally. In addition, section 11.01 also says that travel to these out-of-town locations shall form part of the workday.

[34] The Conditions of Employment and Accounting Procedures document is the last four pages of Exhibit A-6. See especially page 2, the bullets under the heading "Kit/Equipment Rentals/Cell Phone Use"; see also the second, fourth, fifth and seventh bullets on the first page under the heading "Petty Cash". The text is far from clear because at times it seems to suggest any such reimbursement must be in the deal memo while at other times it seems to envisage ad hoc approval for reimbursements.

[35] The exception is with respect to the film she worked on in Hamilton which was made on a very low budget and where I accept the Appellant's evidence that she was obliged and expected to pay for her own cell phone usage. However, this does not change the practical outcome because for this production, as for the others, no specific quantum of work related cell phone expenditure has been established. My conclusion below on the last question relating to the T2200 form also results in non-deductibility.

[36] A letter from the Appellant's union, the International Cinematographers Guild, was filed as Exhibit R-1.

The letter says that members of the Guild must transport themselves to the worksite and must bring the minimum "kit" necessary to do the job for which they have been hired. It continues to say that, unless members have negotiated allowances to reimburse the expenses, members will have to pay these expenses themselves.

These general statements do not assist.

the *Income Tax Act* with respect to the expenses claimed, apart from that one exception.[37]

Is Form T2200 Always Obligatory?

[83] By way of background, the Appellant testified she tried to get a T2200 form from EP Canada but was unable to; therefore, the requirement in subsection 8(10) should not apply.

[84] On its face, subsection 8(10) is mandatory. The key words are "[a]n amount . . . shall not be deducted . . . unless a prescribed form . . . is filed . . .". Similarly, under subsection 220(2.1) the taxpayer ". . . shall provide the document . . . at the Minister's request".

[85] In determining whether in any particular circumstances the filing of a T2200 form might not be required, it is helpful to consider the question: What would be the legal basis underlying a conclusion that filing the form may not be necessary?

[86] Under the doctrine of the separation of powers, it is a basic principle of our constitutional law that the role of the courts is to apply legislation and not to amend

[37] Two other provisions were invoked by the Appellant in support of the deductibility of certain expenses. I will deal with them briefly.

The first was paragraph 8(1)(*q*) of the *Act* which allows an employed artist to deduct certain expenses:

> (*q*) where the taxpayer's income for the year from the office or employment includes income from an artistic activity
>
> (i) that was the creation by the taxpayer of, but did not include the reproduction of, paintings, prints, etchings, drawings, sculptures or similar works of art,
>
> (ii) that was the composition by the taxpayer of a dramatic, musical or literary work,
>
> (iii) that was the performance by the taxpayer of a dramatic or musical work as an actor, dancer, singer or musician, or
>
> (iv) in respect of which the taxpayer was a member of a professional artists' association that is certified by the Minister of Communications,
>
> . . .

Nothing in the evidence showed that the Appellant earned income from any activity described in subparagraphs (i) to (iii) and there was no evidence that the Appellant was a member of an association described in subparagraph (iv).

Paragraph 8(1)(*q*) has no application.

The second provision invoked was paragraph 8(1)(*s*) of the *Act* which allows for the deduction by tradespersons of certain amounts in relation to "eligible tools". Subsection 8(6.1) is also pertinent. Generally, a tool is a mechanical implement that allows one to work on something. Nothing in the expenses claimed appears to be a mechanical implement.

Even without considering the other requirements of paragraph 8(1)(*s*), that provision clearly has no application.

or suspend it. Enacting and amending legislation is the role of Parliament and the provincial legislatures. Administering legislation is the role of the executive.[38]

[87] From this principle, it follows that a court cannot ignore the requirements of subsections 8(10) or 220(2.1) of the *Income Tax Act*.

[88] However, there is a separate question as to what exactly is the obligation imposed by the *Act*.

[89] It is useful to recall section 10, and especially section 12, of the *Interpretation Act*. They read as follows:

> 10 The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.
>
> . . .
>
> 12 Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[90] The question that may arise with respect to a particular legal requirement in certain factual circumstances is whether the maxim that "the law does not require the impossible"[39] has any application. This is, in effect, a rule of interpretation.[40]

[91] Given that the possibility of dispensing with the required form arises from reading into the text of the particular provision of law that the law does not require

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[38] This stems from a number of sources including the *Constitution Act*, 1867, notably the words "with a Constitution similar in Principle to that of the United Kingdom".

The principle is stated in very general terms. These are, of course, numerous additional qualifications to add. For example, the legislative power of Parliament is subject to the Constitution and, on occasion, the courts may have to decide if a law conforms to the Constitution. In some cases, courts have struck down unconstitutional laws or portions of laws.

[39] In Latin, the maxim is: *Lex non cogit ad impossibilia*; in French: "À l'impossible, nul n'est tenu".

[40] The maxim and its application are discussed in a number of cases covering a variety of contexts. None of them are income tax cases.

See, for example, the Alberta Court of Appeal decision in *Boardwalk Reit LLP v. Edmonton (City)*, 2008 ABCA 220, paragraphs 75 to 88, *Genest c. Duchesne*, 2012 QCCA 2098, paragraph 4, a decision of the Quebec Court of Appeal, or paragraph 59 of *Onyskiw v. CJM Property Management Ltd.*, 2016 ONCA 477, a decision of the Ontario Court of Appeal.

More generally, see the discussion in *The Interpretation of Legislation in Canada*, by Pierre-André Côté, fourth edition (2011), at pages 473 to 486, notably at page 479.

the impossible, if the maxim applies, it is clear that a very high standard of effort to comply with the law would be required of the taxpayer.

[92] To meet that standard, an individual would need to make the efforts that a careful, diligent person who is aware of their legal obligations would make.[41]

[93] In addition, in a case where an employer has refused to fill out the form, it would have to be shown that the employer acted unreasonably or in bad faith.

[94] There are two cases where this Court has raised the possibility that there may be circumstances where employment expenses may be allowed even though a required T2200 form has not been produced. I agree that there may be such circumstances if it is impossible for a person to obtain the T2200 form.

[95] In *Brochu v. The Queen*,[42] Justice Boyle said:

> 11 . . . While it may be possible that in exceptional circumstances a paragraph 8(1)(*h.1*) claim could succeed if an employer unreasonably refused, or was unable, to complete and sign a T2200 form, this is clearly not such a case. . . .

[96] A similar question came up again in *Kreuz v. The Queen*.[43] In *Kreuz*, Justice D'Auray concluded that the Appellant had not demonstrated that the employers had acted unreasonably or in bad faith; accordingly, the T2200 form was obligatory.

[97] In this case, the Appellant led evidence that she tried to obtain a T2200 form from EP Canada.

[98] I am satisfied that EP Canada had good reason to refuse. It was not the employer and it was not retained by the employers to prepare T2200 forms.

[99] The Appellant has not shown that any of her five employers were unreasonable or in bad faith in refusing to produce a T2200 form. In addition, she never sought T2200 forms from the five employers.

[100] As previously discussed, subsection 8(10) requires an individual to file the form with their income tax return unless the Canada Revenue Agency waives the

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[41] Such efforts do not require "extreme ingenuity, superhuman effort, nor massive unusual resources to comply with an Act" (*Boardwalk Reit LLP v. Edmonton (City)*, 2008 ABCA 220, paragraph 76).
[42] 2010 TCC 274.
[43] 2012 TCC 238.

requirement to file the form pursuant to subsection 220(2.1), in which case the individual must provide the form upon request from the CRA.

[101] Diligence requires an individual to take steps to obtain a completed form in time for the tax return due date.

[102] Indeed, a diligent individual seeking to comply with the obligation to file the form would see upon reading the version of the T2200 form for the 2010 taxation year[44] that it said near the top: "The **employee** does not have to file this form with his or her return, but must keep it in case we ask to see it. . . ."[45]

[103] The Appellant's evidence did not outline such steps. At the hearing she testified that she had only become aware recently of form T2200.[46]

[104] In this case, there was not the required diligence in seeking to obtain a completed form.[47]

Subparagraph 7b) of the Original Reply to the Notice of Appeal

[105] Subparagraph 7b) was an assumption of fact that the Appellant was an employee of EP Canada Film Services Inc.[48] It was withdrawn in an amended reply and a further amended reply, both of which were filed the week before the hearing. The amended replies were filed on consent.

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[44] Exhibit A-11.

[45] Similarly, when reading the 2010 version of the CRA Guide T4044, the individual would find various statements that expenses for motor vehicles, travel or supplies may be deducted provided that the individual meets all of certain enumerated conditions, including: "You keep with your records a copy of Form T2200, *Declaration of Conditions of Employment* that has been completed and signed by your employer."

[46] The Appellant led evidence that the production companies set up offices for the duration of the filming and that those offices were closed within a few weeks of the end of filming. The Appellant argued this made obtaining the T2200 form from those companies impossible. I am not satisfied that this was the case for two reasons. First, as we have already seen, there was no effort to obtain the form in a timely way — around or before tax time. As a result the evidence does not show that it was impossible to obtain the form had it been sought in a timely way. Second, the evidence does not establish that the production companies were not in existence at some other location where they could be contacted even if the office set up during filming had closed down.

As a practical matter, the easiest way to deal with this is to seek the form while the local office is still in operation.

[47] In making these general comments, I hasten to add that I heard relatively limited argument on the question when it might not be necessary to file a T2200 form. The only case law cited by the parties was *Brochu* and *Kreuz* discussed above.

[48] "EP Canada Film Services Inc." is the name given in the reply. Elsewhere in the documents one finds "Entertainment Partners Canada Inc.". Indeed, the second page of Exhibit A-6, the "Start Slip Employee", shows "Entertainment Partners Canada" at the top left and "© EP Canada Film Services Inc." at the bottom right. Whatever the correct name of EP Canada, EP Canada was not the employer. The production companies were.

[106] Counsel for the Respondent stated that the Appellant was advised that there would be an amendment a few weeks before the hearing.

[107] I would first observe that even if that assumption had not been withdrawn on consent, the evidence was crystal clear that EP Canada was not the employer. That is evident on reading the sample deal memo.

[108] While that assumption, even if it had not been withdrawn, could not change the facts, it was not helpful to the appeal process. It contributed to the Appellant devoting effort to showing that EP Canada refused to provide a T2200 form and is a consideration in dealing with costs.

[109] It is surprising that, after going through the audit stage and the objection stage, discussions between the Canada Revenue Agency and the Appellant or her representative would not have made it apparent that the Appellant had several employers in the year.[49]

The GST Rebate

[110] Originally, there was also an issue regarding a GST rebate of $277.46 claimed and denied by the Canada Revenue Agency. At the opening of the hearing, the Respondent conceded the issue. This will be taken into account in the judgment.[50]

Costs

[111] Normally, I would not award costs in a case where the result is more or less evenly divided, as is the case here as a result of the concession, and where the hearing was entirely devoted to an issue where the Appellant was unsuccessful.[51]

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[49] We do not know how the particular assumption came about although we do know that a single T4 form was issued for the taxation year in the name of the numbered company which operates as EP Canada. That single T4 form included the Appellant's earnings from all five production companies.

Why the CRA did not realize that there were multiple employers is not relevant to deciding this appeal. However, I have been involved in tax matters for a long time and have the impression that for some time the CRA has been asked to do more and more in relation to the resources available. One impression I have is that, as a result, there is relatively less taxpayer contact than there once was and that this has adverse consequences for everyone.

[50] This is a rebate pursuant to section 253 of the *Excise Tax Act* and is, as a result of subsections 253(3) and 253(5), administered under the *Income Tax Act*. After the hearing, I realized that given the evidence there were certain questions I might well have raised at the hearing. However, given subsection 18.15(3) of the *Tax Court of Canada Act*, and given the small amount at stake, I have concluded that I should not reopen the matter to ask those questions and should simply rely on the concession.

[51] By my estimate, the GST credit is somewhat greater than the tax on the expenses of $1,149 in issue.

[112] However, I think that in this case it would be appropriate for me to award limited costs to the Appellant. These costs are a portion of the costs permissible under the *Tax Court of Canada Rules (Informal Procedure)*.

[113] I do so for two reasons: First, the late withdrawal of the assumption in subparagraph 7b) of the original reply to the notice of appeal. Second, the Appellant had to incur some costs early in the appeal process in order to obtain the concession on the GST credit.

[114] Taking account of these considerations and of sections 11, 11.1 and 11.2 of the *Rules*, I set the costs at a lump sum of $200.[52]

Conclusion

[115] For the reasons set out above, the appeal is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to claim a GST rebate of $277.46. Costs of $200 are awarded to the Appellant.

Signed at Ottawa, Ontario, this 2nd day of May 2018.

"Gaston Jorré"

Jorré D.J.

[52] For greater certainty, this lump sum is inclusive of any disbursements and any taxes that may be allowed pursuant to subsection 11.2(2) of the *Rules*.

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