Docket: 2011-2498(IT)G

BETWEEN:

ROLLIE SHAW,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 24, 2013, at Edmonton, Alberta

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant:	James C. Yaskowich
Counsel for the Respondent:	Donna Tomljanovic

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2006 and 2007 taxation years is dismissed.

Costs are awarded to the Respondent.

Signed at Halifax, Nova Scotia, this 22nd day of August 2013.

"V.A. Miller"

V.A. Miller J.

Citation: 2013TCC256
Date: 20130822
Docket: 2011-2498(IT)G

BETWEEN:

ROLLIE SHAW,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] This appeal relates to Mr. Shaw's 2006 and 2007 taxation years. The Minister of National Revenue (the "Minister") included the amounts of $47,000 and $93,000 in his income in 2006 and 2007, respectively, on the basis that these amounts were income from employment pursuant to subsections 5(1) and 6(1) of the *Income Tax Act* (the "*Act"*). The Appellant claims that they were gifts he received from his former employer.

[2] Two witnesses testified at the hearing – the Appellant and Leo Robert on behalf of the Appellant.

[3] The parties submitted a Statement of Agreed Facts which reads in part as follows:

> 1. At all material times, the Appellant was an individual resident in Canada and Alberta for the purposes of the Act.
>
> 2. Prior to May of 2006, the Appellant was employed as the equipment manager for L. Robert Enterprises Ltd. ("Robert Ltd.") in Fort McMurray, Alberta. The Appellant had held this and other positions with Robert Ltd. for at least 14 years prior to 2006.

3. At all material times, Leo Robert ("Leo"), an individual resident in Canada, controlled Robert Ltd.

4. During 2006, Robert Ltd. agreed to sell its business and assets (the "Asset Sale") to L. Robert Enterprises Corp. (Robert Corp.) a newly incorporated subsidiary of CEDA International Corporation ("CEDA").

5. On May 1, 2006, subsequent to the Asset Sale, Robert Ltd. changed its name to 236419 Alberta Ltd. ("236419") and ceased to carry on the business formerly carried on by Robert Ltd. For the purposes of this Statement of Agreed Facts, we will continue to use Robert Ltd. to identify 236419.

6. Subsequent to the Asset Sale, the Appellant became employed by Robert Corp. as the equipment manager.

7. On or about September 28, 2006, the Appellant received a letter informing him that he would be in receipt of a payment. A copy of that letter, with handwritten notations of the Appellant, was attached to the Statement of Agreed Facts.

8. Starting in December 2006, Leo directed Robert Ltd. to make payments to the Appellant and other former managers of Robert Ltd. (the "Payments"). The Payments to the Appellant were as follows:

   (a) A payment of $47,000 on December 8, 2006;

   (b) A payment of $47,000 on January 8, 2007; and,

   (c) A payment of $46,000 on November 28, 2007.

9. The Payments were paid out of that corporation's shareholder loan account owed to Leo. Copies of the Shareholders' Loan ledger of L. Robert Enterprises Ltd. showing the payments to the Appellant were attached to the Statement of Agreed Facts.

10. The amounts in Robert Ltd.'s shareholder loan account owed to Leo were tax paid, that is the balance arose from bonuses declared to Leo, but not paid to him in cash, in previous years.

11. Robert Ltd. did not withhold any amounts on the Payments since the Payments represented a repayment of Leo's Shareholder Loan. In particular:

   (a) The Shareholder Loan account was reduced by amounts corresponding to the Payments to the Appellant; and,
   (b) Robert Ltd. did not claim any income tax deduction for the Payments to the Appellant.

> 12. On or about June 24, 2009, the Appellant received a letter informing him that he had received Payments of $140,000 in total.

[4] The letter dated September 28, 2006 which was referred to in paragraph 7 of the Statement of Agreed Facts reads, in principal part:

> The sale of the L. Robert Group of Companies to CEDA International marks a new beginning for all of us. For me, it is retirement and enjoying life in Kelowna. For you, it is a new beginning with CEDA and numerous opportunities within the group.
>
> As a Thank You for your years of service and for helping me make the company a success, I will be rewarding you with a bonus that will be paid out to you over the next three years on the anniversary date of the sale. The bonus will be $10,000 per year of service with the company and will only be payable to you if you remain an employee of the CEDA Group. This bonus will not be taxable to you as the tax will be paid by the company.

[5] The letter dated June 24, 2009 which was referred to in paragraph 12 of the Statement of Agreed Facts reads, in principal part:

> This letter is confirmation of the bonus received from Leo Robert after the sale of the company.
>
> The total amount paid to you was $140,000 with $47,000 paid in December of 2006, $47,000 paid to you in January of 2007 and the remaining $46,000 paid to you in November of 2007. These amounts were not taxable to you as these amounts were paid from my shareholder's loan account on money that the tax had already been paid by the company.

[6] The Appellant was one of nine managers employed by Robert Ltd. in 2006 when its business was sold to the CEDA group. Mr. Robert gave each of the nine managers $10,000 for each year they had been employed by Robert Ltd. The highest amount received by a manager was $210,000 and the lowest amount received was $30,000. Mr. Robert estimated that he gave $880,000 in total to the managers of Robert Ltd. The Appellant received $140,000.

[7] I will refer to the amounts received by the Appellant and the other managers as the Payments.

[8] It was the Appellant's position that he and Mr. Robert were friends and the Payments which he received were a gift which Mr. Robert wished to bestow on him as a friend. Counsel for the Appellant argued that the amount of $140,000 was given to the Appellant in his personal capacity and not as an employee of Robert Ltd.

[9] In his testimony, the Appellant described how he met Mr. Robert and became employed by Robert Ltd. His evidence centered on the relationship he had with Mr. Robert and the social events he attended with him.

[10] Mr. Robert stated that he intended the Payments to the managers to be gifts. He said that the letters dated September 28, 2006 and June 24, 2009 were written for him and signed on his behalf by Kevin Shulko, the CFO of Robert Ltd. In these letters, Mr. Shulko had written that the Payments were bonuses and Mr. Robert disagreed with this terminology. In his view, a bonus was something the managers received at Christmas. He stated that the Payments to the managers had nothing to do with the work. He had already sold Robert Ltd. and he gave them the Payments as a thank you for giving him "a hand" when they were working together.

[11] The relevant provision of the *Act* is paragraph 6(1)(*a*). It was described by Linden J.A. in *Blanchard* v *Canada*, [1995] 2 CTC 262 (FCA) as an all-embracing provision. In *Blanchard*, Linden J.A. gave guidelines for the interpretation of paragraph 6(1)(*a*) and he listed situations where it was found not to be applicable. He wrote:

> 4 …It provides that all "benefits of any kind whatever" are to be included as employment income if they were received "in respect of, in the course of, or by virtue of an office or employment." The section casts a wide net, incorporating two broadly worded phrases. The first is "benefits of any kind whatever." The scope contemplated by this phrase is plain and unambiguous: all types of benefits imaginable are to be included. Speaking for the majority in *The Queen v. Savage* , Dickson J. (as he then was) stated that paragraph 6(1)(a) was "quite broad" and covered any "material acquisition which confers an economic benefit."
>
> 5 The second phrase is a group of three phrases: "in respect of," "in the course of," and "by virtue of." In *Nowegijick v. The Queen* , the Supreme Court of Canada explained the words "in respect of":
>
> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters. [3]
>
> 6 The above comments are relevant in interpreting paragraph 6(1)(a). Parliament, has added the phrases "in the course of" and "by virtue of", to the phrase "in respect of" in order to emphasize that only the smallest connection to employment is required to trigger the operation of the section.
>
> 7 Paragraph 6(1)(a) leaves little room for exceptions, but a few have surfaced in the jurisprudence. First, reimbursements paid by an employer to an employee for expenses incurred by that employee are not taxable. They are not benefits. They do

> not put anything in the taxpayer's pocket, but merely save the pocket of the taxpayer. [4] In other words, they are merely payments in an overall zero-sum transaction. Speaking to the facts underlying the case, Cullen J. in *Splane v. Canada* stated:
>
> The plaintiff moved at the request of his employer, incurred certain expenses in the move, and suffered a loss. The reimbursement of these expenses cannot be considered as conferring a benefit within the terms of the Act. The plaintiff was simply restored to the economic situation he was in before he undertook to assist his employer by relocating to the Edmonton office. [5]
>
> 8 Reimbursements for costs actually incurred are, therefore, not caught by paragraph 6(1)(a).
>
> 9 Second, a benefit that is wholly "extraneous" or "collateral" to one's employment, that is, one that is received in one's "personal capacity" only, may fall outside paragraph 6(1)(a). [6] This exception is very narrow and is available only where there is no connection or link to the employment relationship.

[12] In *The Queen* v *Savage,* [1983] 2 SCR 428, the Supreme Court accepted that a benefit must be conferred on a taxpayer in his capacity as an employee in order for the benefit to be taxable. However, in *Savage, supra,* Dickson J. stated that the benefit need not have the character of remuneration for services in order to be included in income.

[13] As stated earlier, it is the Appellant's position that he received the Payments in his personal capacity and as a gift from his former employer. The Payments were definitely a benefit received by the Appellant but the question is whether they were wholly 'extraneous' or 'collateral' to his employment.

[14] Counsel for the Appellant relied on the Federal Court of Appeal decision in *The Queen* v *Phillips*, [1994] 2 FC 680 (FCA) to argue that the question of whether the Payments are gifts or the result of considerations extraneous to the Appellant's employment relationship should be decided by referring to Mr. Robert's intention in making the Payments.

[15] Mr. Robert testified that he intended the Payments to be gifts to the managers and he intended that they should not have to pay taxes on the Payments.

[16] I note that in the letter dated September 28, 2006, Mr. Robert informed the Appellant that the Payments would not be taxable to him because the tax would be paid by the company. Although Mr. Robert disagreed with the use of the word "bonus" in this letter, he did not disagree with this statement in the letter. However, I also note that in the letter dated June 24, 2009, Mr. Robert gave a different reason for the non-taxability of the Payments.

[17] A review of the evidence and in particular, Mr. Robert's evidence, has led me to conclude that the Appellant did not receive the Payments from Mr. Robert because he was a friend. Rather, he received the Payments because he was a manager of Robert Ltd. at the time that it was sold. All managers received Payments that were calculated in accordance with their years of service with Robert Ltd. Mr. Robert gave the Payments to each of the managers in their capacity as employees and he did not distinguish the Appellant from the other managers.

[18] The September 28, 2006 letter stipulated that the Payments would be paid to the Appellant over a three year period and would be made to the Appellant only if he remained an employee of the CEDA group. Mr. Robert said that his rationale for including this condition in the letter was that he wanted the managers to stay with the CEDA group so that they would have continuity in their lives. Also, in 2006, it was difficult to find and keep employees in Fort McMurray and this requirement would also send a message to the CEDA group to treat his former managers with respect. The evidence disclosed that the Appellant worked with the CEDA group until June 2011.

[19] Although Mr. Robert stated that he intended the Payments to be a gift, his letter dated September 28, 2006 clearly connect the Payments to the Appellant's employment with Robert Ltd.

[20] When I apply the principles outlined in *Savage*, *Phillips* and *Blanchard*, I conclude that the Appellant received the payment of $140,000 in respect of, in the course of and by virtue of his employment. When a taxpayer received a payment on the condition that he continue to work for a particular employer, then that payment can hardly be said to have arisen from considerations extraneous to his employment: *Phillips* (*supra*) at paragraph 19. That one manager left the CEDA group prior to the expiration of three years and he received $10,000 directly from Mr. Robert does not alter that the condition was made and adhered to by the Appellant. The September 28, 2006 letter clearly stated that the Appellant was receiving the Payment in respect of and by virtue of his employment with Robert Ltd. The Payment was received "as a thank you" for his years of service with Robert Ltd.

[21] The fact that the Appellant was not employed by Mr. Robert when he received the Payment does not alter my conclusion. Paragraph 6(1)(*a*) speaks to including benefits in computing the income of "the taxpayer for a taxation year as income from an office or employment". Although the taxpayer must be an employee or an officer, it is not necessary that he be the employee or officer of the person who bestowed the benefit at the time the benefit was given: *C* v *Minister of National Revenue*, 1950

CarswellNat 33 (TAB). All that is necessary is that the taxpayer received the benefit "in respect of, in the course of, or by virtue of an office or employment".

[22] The appeal is dismissed with costs.

Signed at Halifax, Nova Scotia, this 22nd day of August 2013.

"V.A. Miller"

V.A. Miller J.

CITATION:	2013TCC256
COURT FILE NO.:	2011-2498(IT)G
STYLE OF CAUSE:	ROLLIE SHAW AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	April 24, 2013
REASONS FOR JUDGMENT BY:	The Honourable Justice Valerie Miller
DATE OF JUDGMENT:	August 22, 2013

APPEARANCES:

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