Citation: 2018TCC165
Date: 20180821
Docket: 2016-5251(IT)I

BETWEEN:

DONALD ROSS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

(Let the following Reasons for Judgment delivered orally from the Bench on June 28, 2018 at Toronto, Ontario as modified on a non-substantive basis solely for purposes of grammar and clarity be filed.)

Russell J.

[1] These are my oral reasons for judgment in this appeal brought by Donald Ross, Appellant, of an assessment raised October 21, 2014 under the *Income Tax Act* (Canada) (Act) of his 2013 taxation year. The assessment denied deduction of claimed employment expenses of $87,647 (rounded to nearest dollar). That is the focus of the Appellant's appeal. The assessment was objected to and confirmed, leading to this appeal, which the Appellant elected be heard under this Court's "informal procedure". The Appellant chose to represent himself in this appeal including at the April 12, 2018 hearing before me.

[2] The Appellant's notice of appeal consisted of a letter to the Court's Registry dated December 8, 2016 and enclosing the September 13, 2016 notice of confirmation of the Minister of National Revenue (Minister) of the appealed assessment. The letter referred in point form to "travel expense", "home office" and "commission paid (out)". Also it indicates that the Appellant's return for 2013 was prepared by the Appellant himself and or with assistance of two individuals Isabel Beer and Ximena Tinajero, and referring to use of the "Turbo Tax system". The letter refers to "duplicated [travel] receipts enclosed" which apparently were not enclosed.

[3] This letter to the Court's Registry, accepted as being Mr. Ross' notice of appeal, appears to be responding to the Minister's enclosed September 13, 2016 notice of confirmation of the appealed reassessment. That notice of confirmation was attached to Mr. Ross' letter being the notice of appeal. Its three key but short paragraphs read:

> The basis of your objection is that your tax return for 2013 was reassessed and employment expenses of $87,647.38 were disallowed because appropriate documentation was not provided to the Pre-Assessment Review Section at the Tax Centre.
>
> As we did not receive any representations in response to our letter sent on July 14, 2016, we relied on the information available in the file. Our review has determined that you do not meet the conditions required to claim employment expenses as per subsection 8(13), paragraph 8(1)(h), subparagraph 8(1)(h.1), and subsection 8(2) of the Income Tax Act.
>
> As a result, we will be confirming the tax centre's decision to disallow your employment expenses of $87,647.38 claimed.

[4] I've referred to the Appellant's notice of appeal. In response to that pleading which instigated this appeal, the Minister as usual served and filed the Crown's pleading, called a "Reply". I will quote from the Reply at some length. Of course it is trite law that the "assumptions of fact" pleaded in a Reply are presumed to be true except and to the extent the Appellant brings evidence establishing at least a *prima facie* case otherwise. The reason for that preference is that the taxpayer is expected to know more about his, her or its affairs than does the Minister. Thus the onus is upon the taxpayer to establish if and where the Minister is wrong as to what he or she has assumed is the taxpayer's situation.

[5] Now, turning to the Reply, it states:

> 6. In determining the Appellant's tax liabilities for the 2013 taxation year, the Minister made the following assumptions of fact:
>
> a) the Appellant reported total employment income of $172, 706.43 in the 2013 taxation year, consisting of the following:

Jones Gable	$ 4,055.47
JG T5	$ 505,612.65
Thoroughbred	($ 196,961.69)
D Acct Trading Loss 2013	($.140,000.00)
Total Reported Employment Income	$ 172,706.43

b) the Appellant received T4 employment income of $4,055.47 from Jones, Gale & Company Limited (:Jones) in the 2013 taxation year, of which $3,327.91 was commissions;

c) in filing his return for the 2013 taxation year, the Appellant claimed total employment expenses of $87,647.38 as detailed in the attached Schedule "A":

SCHEDULE A – Employment expenses (2013 taxation year)

2013 taxation year	Claimed	Allowed	Disallowed
OFFICE IN HOME	$4,850.00	$0.00	$4,850.00
PERIODICALS	$400.00	$0.00	$400.00
AUTO INS & LIC & CAA	$1,737.43	$0.00	$1,737.43
REPAIRS – ¼	$2,488.18	$0.00	$2,488.18
PARKING TAXI EX GAS ¼	$311.75		$311.75
MILEAGE – exp 20,590kms	$4,532.75	$0.00	$4,532.75
LCBO – ¼	$163.34	$0.00	$163.34
RESTRNTS & HOME ENT – ¼	$6,148.75	$0.00	$6,148.75
GIFTS & TRAVEL	$2,939.18	$0.00	$2,939.18
OWN COMM PD – 1/5	$64,076.00	$0.00	$64,076.00
Total employment expenses	$87,647.38	$0.00	$87.647.38

d) the employment expenses claimed by the Appellant consisted of the following: office in home, periodicals, auto insurance, repairs, parking, mileage, LCBO, meals & entertainment, gifts, travel and commission paid;

e) the Appellant submitted a T2200 – *Declaration of Conditions of Employment* ("T2200") prepared by Jones for the 2013 taxation year;

f) Jones did not require the Appellant to maintain an office at home;

g) the Appellant was not required to work away from his place of employment at Jones;

h) the Appellant was not required by Jones to pay for his supplies used directly in his work;

i) the Appellant received a $49,549 reimbursement from Jones for expenses related to travel and entertainment in the 2013 taxation year (the "Reimbursement");

j) the Reimbursement was not included as income on the Appellant's 2013 T4 slip from Jones;

k) the Appellant did not incur any employment expenses in the 2013 taxation year in respect of his employment; and

l) the employment expenses claimed were not made or incurred to carry out his employment duties for Jones.

Other Material Facts

7. The Appellant mischaracterized the following amounts as employment income in the 2013 taxation year:

a) T5 interest income of $505,612.65 from Jones, Gable & Company Limited;

b) Thoroughbred horse losses in the amount of $196,961.69; and

c) D. Acct Trading capital losses of $140,000.00.

ISSUE TO BE DECIDED

8. The issue is whether the Appellant is entitled to deduct employment expenses in the amount of $87,647 for the 2013 taxation year.

GROUNDS RELIED ON AND RELIEF SOUGHT

10. [The Minister] respectfully submits that, pursuant to section 8, subsections 8(2) and 8(13) and paragraphs 8(1)(h) and 8(1)(h.1) of the *Act*, the Appellant did not make or incur employments expenses of $87,647 for the 2013 taxation year for the purpose of earning income from employment.

[6] That is in the Reply, and that was a document that was in Mr. Ross' hands, and the purpose of that document is to map out pretty well what it is the Minister is thinking and to allow the taxpayer to know what to address in the hearing.

[7] At the hearing of this matter only Mr. Ross testified. Also four documents were entered into evidence. One was Mr. Ross's Form T2200 from his employer firm. It is signed by a person, Robb Hindson, identified as the CFO of Jones Gable. This Form T2200 was submitted as evidence by the Appellant. It includes the following statements:

Did this employee's contract of employment require him or her to use a portion of his or her home for work?

> The answer "no" is checked off.
>
> Did you or will you reimburse this employee for any of his or her home office expenses?
>
> The answer "no" is checked off.
>
> Did this employee's contract require him or her to pay his or her own expenses while carrying out the duties of employment?
>
> The answer "yes" is checked off.
>
> Did you normally require this employee to travel to locations that were not your place of business of between different locations of your places of business, during the course of performing his or her employment duties?
>
> The answer "no" is checked off.
>
> Did you require this employee to be away for at least 12 consecutive hours from the municipality and metropolitan area (if there is one) of your business where the employee normally reported for work?
>
> The answer "no" is checked off.

His cover letter dated July 15, 2014 to Canada Revenue Agency includes the statement that:

> Regarding the T4 income on line 101 - $140M was put in to secure D Acct Net Debit. In addition 2013 commission income of $782,000 was not directed to me due to same under-secured position. The $64,076 commission paid expense comes from an $80,000 purchase paid on a private placement plus $95 on another trade less 20%.

[8] Also we have Mr. Ross' T4 indicating $4,055 of employment income with his firm. Mr. Ross' evidence is that it is low because much of his otherwise substantial commission income went to secure an otherwise under-secured position of a security held by a client of his firm.

[9] Finally, as the fourth and final document, we have an October 10, 2014 letter from CFO Mr. Hindson of Mr. Ross' employer Jones Gable saying that,

> We answered "no" to questions 1 and 9(a) of his 2013 T2200 because we do not have a written agreement in place with him [Mr. Ross] that requires him to pay his expenses while carrying out his duties of employment or to maintain an office in his home. However, as a practical matter, individuals who are engaged in the

> number and range of income generating activities that Mr. Ross is frequently incur business expenses and typically work hours that are significantly outside "normal" office hours, including performing at least some of their work at home. In the case of Mr. Ross, the undersigned [Mr. Hindson] is not in a position to attest to the deductibility of the expenses claimed on his tax return or the office facilities which he maintains in his home, but believes it probable that he incurred deductible expenses for which he was not reimbursed and can attest to that fact that he continually takes substantial volumes of work home with him, and arrives at the office in the morning with work that he has done. As such, he may have a reasonable basis for claiming expenses.
>
> Please note that Mr. Ross' T4 for 2013 is not reflective of the income generating activity referred to above as his earnings were largely offset against losses in a Jones, Gable inventory trading account operated and guaranteed by Mr. Ross.

[10] At the hearing Mr. Ross testified and was cross-examined. His evidence was that most of his work was done at his Toronto office as opposed to a home office. He also testified that he did significant traveling on behalf of clients, which I took to be at least for the most part travel within the greater Toronto region and otherwise within the province. His testimony regarding the $64,000 commission expense, in the context of an employment expense, was difficult to follow. He presented no documentation that might have assisted his elucidation of that subject matter. He said that the claimed deduction of $64,000 as a paid commission to his firm had always been allowed through an agreement with Canada Revenue Agency. But he was unable to further explain the legal or factual basis for that or to show any corroborative documentation. At the conclusion of the hearing the Respondent's position continued to be as reflected in the Reply, submitting also that Mr. Ross' testimony had been difficult to understand and follow.

[11] The issue is whether Mr. Ross has been able to show that the appealed assessment disallowing the claimed deduction of employment expenses of $87,647 is wrong.

[12] It appears that Mr. Ross claimed these items, in particular the deduction for payment of a $64,000 commission to his firm, as an employment expense. It seems he had filed the return in Turbo Tax, possibly himself. It is possible that the commission was wrongly entered in the return as an employment expense. One would expect more usually that any commission paid to a broker for obtaining a security for private holding would be added to the adjusted cost base of the security to be deducted from any gain arising on the disposition of the security, to determine resulting capital gain or loss; or deducted as an expense if gain on sale of the security is to be reported on income account.

[13] The matter of employment expenses is tightly constrained under the Act, per section 8. Subsection 8(2) states that no employment expenses may be claimed that are not permitted by section 8. Nothing in section 8 referring to deduction of commission payment in the purchase of a security was brought to my attention nor am I aware of any such provision in that section.

[14] Paragraphs 8(1)(h) and 8(1)(h.1) deal with travel expenses other than motor vehicle expenses and with motor vehicle expenses respectively. These provisions require that the employment ordinarily require travel, and without reimbursement. But the Form 2200 for Mr. Ross says his travel is not required for his employment. Nor is a home office required. Possibly they would be deductible as business expenses but Mr. Ross is an employee of his firm, so this is an employment relationship.

[15] On the basis of the foregoing, in my view Mr. Ross has not proven a *prima facie* case that rebuts the assumptions made by the Minister. Accordingly, I have no alternative but to dismiss the appeal, without costs to either side.

[16] However, Mr. Ross, I do wish to bring to your attention subsection 152(4.2) of the Act. It allows an individual taxpayer to request the Minister to reassess an individual's taxation year provided it is less than 10 years in the past. It is a discretionary matter for the Minister and the fact you have already appealed the year may encourage the Minister to say no. But there may be some further information or documentation you can provide to the Minister that supports your claim that was not provided to this Court in our hearing. If you are interested in exploring that route I recommend you obtain legal advice.

Signed at Halifax, Nova Scotia, this 21st day of August 2018.

"B. Russell"

Russell J.

CITATION:	2018TCC165
COURT FILE NO.:	2016-5251(IT)I
STYLE OF CAUSE:	DONALD ROSS AND THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 28, 2018
REASONS FOR JUDGMENT BY:	The Honourable Justice B. Russell
DATE OF REASONS FOR JUDGMENT:	August 21, 2018

APPEARANCES:

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Firm:

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