Docket: 2019-623(IT)I

BETWEEN:

LESLIE H. HAMILTON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 7, 2019, at Nanaimo, British Columbia

Before: The Honourable Justice Diane Campbell

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Alexander Wind

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2014 and 2015 taxation years are allowed, without costs, and the reassessments are referred back to the Minister for reconsideration and reassessment on the basis that the Appellant's overtime meal allowances of $3,780.00 in 2014 and $2,880.00 in 2015 are not taxable.

Signed at Vancouver, British Columbia, this 5th day of February 2020.

"Diane Campbell"

Campbell J.

Citation: 2020 TCC 23
Date: 20200205
Docket: 2019-623(IT)I

BETWEEN:

LESLIE H. HAMILTON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

[1] The Appellant was reassessed for his 2014 and 2015 taxation years on March 5, 2018 and June 29, 2018 respectively. These reassessments included in his income total benefit amounts of $13,128.01 in the 2014 taxation year and $8,807.90 in the 2015 taxation year in respect to travel and overtime meal allowances conferred on him in his capacity as an employee of CIMS Limited Partnership (the “Employer”). In 2014, the overtime meal allowance portion of the total benefit amount was $3,780.00 and in 2015 it was $2,880.00. In 2014, the travel allowance portion of the total benefit amount was $9,348.01 and in 2015 it was $5,927.90. The issue is whether the Minister of National Revenue (the “Minister”) was correct in including these allowance amounts in the Appellant’s income in the 2014 and 2015 taxation years. The amounts at issue were not in dispute but only whether they were, in fact, taxable.

[2] The Employer provides essential maintenance and turnaround services to large industrial facilities generally in northern locations, including the pulp and paper industry, together with the mining and smelting, oil and gas, power generation and chemical sectors. There were 3,720 employees employed in 2014 and 3,568 in 2015. The employees, including the Appellant, were hired through union halls that provided services to these out-of-town projects.

[3] When an employee worked at remote locations, the Employer provided each employee with a choice of either a living-out allowance of $135.00 daily or a daily

meal allowance of $62.50 together with a room, in accordance with the provisions of a Collective Agreement. These amounts are not in issue in these appeals as the Minister determined these amounts to be reasonable.

[4] In addition to these amounts, the Employer provided the Appellant with a travel allowance for commuting both to and from a predetermined location, such as a city hall, union hall or other similar point of dispatch depending on the employee's union and the work site. This allowance was calculated on a per-kilometer rate and based on the distance between the predetermined location and the work site. The Employer also provided the Appellant with an additional overtime meal allowance which was paid to an employee once he had completed 10 hours of work while on the work site.

[5] As a result of an audit of the Employer's payroll account, the Employer issued an amended T4 to increase the Appellant's employment income for 2014 and 2015 by including in income the overtime meal allowances paid daily after 10 hours working on the work site and travel amounts paid from the predetermined commencement location to the work site.

I. Analysis

[6] I will deal first with the overtime meal allowance amounts. Since the parties agree that these amounts are allowances, they will be taxable if they are caught by paragraph 6(1)(b) of the *Income Tax Act* (the "*Act*") and not subsequently excluded by the exceptions contained in subparagraphs 6(1)(b)(i) to (ix) and subsection 6(6) which relates to "special work sites."

[7] The Respondent submitted that the overtime meal allowance amounts were taxable because they were caught by paragraph 6(1)(b) and not subsequently excluded pursuant to subparagraphs 6(1)(b)(i) to (ix) or subsection 6(6). Counsel relied on the Federal Court of Appeal decision in *Canada (AG) v MacDonald*, [1994] FCJ No. 378 where Linden J.A., at paragraph 14, set out the three elements required for determining that an amount is a taxable allowance:

> 14 Nonetheless, following Ransom, Pascoe and Gagnon the general principle defining an "allowance" for purposes of paragraph 6(1)(b) is composed of three elements. First, an allowance is an arbitrary amount in that it is a predetermined sum set without specific reference to any actual expense or cost. As I noted above, however, the amount of the allowance may be set through a process of projected or average expenses or costs. Second, paragraph 6(1)(b) encompasses allowances

> for personal or living expenses, or for any other purpose, so that an allowance will usually be for a specific purpose. Third, an allowance is in the discretion of the recipient in that the recipient need not account for the expenditure of the funds towards an actual expense or cost.

[8] In the present appeal, clause 16.02 of the Collective Agreement states that when an employee works more than 10 hours, the Employer will provide a meal and beverage, a 30-minute meal break and compensate an employee at a straight time rate of pay. Where this is impractical in the circumstances, then the employee will receive a $40.00 meal allowance. The Respondent's witness, a CRA compliance officer, testified that in his view the overtime meal allowance, when combined with the already available living allowance of $62.50 per day for meals, was not reasonable (Transcript, pages 115-116). The Respondent submitted that the $40.00 amount was a round amount predetermined in accordance with the Collective Agreement; that it was for the specific purpose of food which is a personal expense; and that the Appellant did not have to account for it because he was not required to provide receipts to the Employer. It therefore met the three-element test in the Federal Court of Appeal decision in *MacDonald* and, as such, was caught by paragraph 6(1)(b).

[9] The Appellant relied on a CRA publication, *Overtime Meals or Allowances* (Exhibit A-9), to argue that the overtime meal allowances were reasonable and should not be included in his income as a taxable benefit. This publication states that the CRA "will consider higher amounts reasonable if the relative cost of meals in that location is higher, or under other significant extenuating circumstances" and the amount would therefore not be a taxable benefit. The Appellant testified that his work took him to remote northern work sites where the cost of food could be up to 200% higher. In addition, depending on the job where he worked, this allowance was not always paid and he often had to subsidize the cost of his meals in some remote locations.

[10] The Respondent acknowledged that the overtime meal allowances may be caught by the exception at subparagraph 6(1)(b)(vii), which exempts reasonable allowances for travel expenses, other than allowances for the use of a motor vehicle, paid "in the performance of the duties of the employee's office or employment". However, counsel argued that the overtime meal allowances were not caught by this exception because the plain wording of the term "travel expenses" used in the provision would not include amounts for overtime meals where such meals would not necessitate travel in order to be paid to an employee. The amount was paid for working extra hours at the work site. In addition, counsel

argued that the overtime meal allowances were not reasonable in the circumstances. The Appellant had the option to choose between the $135.00 daily to cover room and meals or to take a room provided by the Employer and be paid $62.50 daily for meals. The Appellant testified that he generally chose the first option of $135.00 daily to cover his room and meals and, although there was no breakdown of this $135.00 amount between the room and the meals paid on a per-diem basis, the Respondent submitted that an amount of $40.00 in addition to the $135.00 amount, generally chosen by the Appellant, was unreasonable.

[11] There are several informal procedure decisions which have concluded that "meal allowances" may be considered "travel allowances" pursuant to subparagraph 6(1)(b)(vii). In *2831422 Canada Inc. v The Queen* and *Dikran Aharonian v The Queen*, [2002] TCJ No. 606, heard together on common evidence, Bowman A.C.J., as he was then, held that a travel allowance of $150.00 paid daily to a shareholder/director/employee to cover hotels, meals, parking and other incidental expenses when he travelled away on business, was a reasonable allowance that fell within the exception contained in subparagraph 6(1)(b)(vii). He distinguished the Federal Court of Appeal decision in *Verdun v The Queen* [1998] DTC 6175 noting that the Court did not consider whether meals allowances could, in fact, be exempt as travel allowances pursuant to subparagraph 6(1)(b)(vii).

[12] In *McKay v R,* 2009 TCC 612, Webb J., at para. 23, noted that there is no requirement in subparagraph 6(1)(b)(vii) that an "…employee be required by his duties to be away for 12 hours or more in order for an allowance to not be included in income." He stated that the meal allowance amount would be <u>included</u> in income, when the meal allowance paid to the employee was <u>not a reasonable</u> allowance for the days that the employee was required to be away for 12 hours or more. If that allowance had been reasonable, the amount would not be included in the employee's income. Webb J. concluded that the meal allowance of $18.00 daily, paid for those days that the employee was not required to be away from his employment for 12 hours or more, would not be included in income pursuant to subparagraph 6(1)(b)(vii), whereas the same allowance, paid for days that he would be required to be away for 12 hours or more, would be included in income and entitle him to a deduction under subsection 8(4).

[13] In *Al Saunders Contracting and Consulting Inc. v MNR*, 2019 TCC 86, Wong J. concluded that flat-rate subsistence allowances, covering meals and hotels and paid to workers at remote locations or while on the road, were travel allowances under subparagraph 6(1)(b)(vii) despite the fact that the employees could use the allowances in any manner they chose.

[14] Although the foregoing decisions allowed meal expenses within the meaning of the term “travel allowances” under subparagraph 6(1)(b)(vii), none of them dealt with a taxpayer who received two allowances which were intended to cover both meal expenses and overtime meal expenses when working remotely. According to the Appellant’s testimony, the overtime meal allowances were paid “in the performance of the duties of the employee’s office or employment” in accordance with subparagraph 6(1)(b)(vii) of the *Act* and they were paid in relation to overtime work hours that were required at remote work locations. The Appellant testified that the Employer provided the employees with overtime meal allowances because of safety concerns in working long hours and the inherently physically-demanding nature of the Appellant’s duties (Transcript, page 70). Although clause 16.02 of the Collective Agreement provided for the payment of overtime meal allowances, regardless of whether an employee was travelling and working remotely, I conclude that in the specific circumstances of this appeal, they are exempt under subparagraph 6(1)(b)(vii) because they were paid in the performance of the Appellant’s employment duties when he travelled away from the municipality where he would ordinarily work and away from the Employer’s work establishment. I also conclude, based on the Appellant’s testimony, that these expenses were reasonable. As Bowman A.C.J., as he was then, noted in the decision in *2831422 Canada,* at paragraph 8:

> 8 … What is reasonable in any circumstance is a matter of fact, judgement, and common sense. In Words and Phrases Legally Defined there are eight pages of two columns dealing with the words reasonable or reasonably, yet no court of which I am aware has ever had the temerity to try to formulate a comprehensive definition of the word, nor do I. Any attempts to assign a meaning to it usually end up using the word itself. It is said to imply the application of objective criteria but it is a word of such fluidity and elasticity that a judge must resist the temptation to let some element of subjectivity creep into his or her determination. What may seem reasonable to one judge may not to another. Attempts to define the "reasonable person" usually end up deferring to some hypothetical passenger on the Clapham omnibus. One can ask "What would an impartial observer possessing a somewhat (but not excessively) above average intelligence, knowing all the relevant facts, having no preconceived notions, biases or hidden agendas consider to be reasonable?" In short, one draws the line between reasonable and unreasonable where one's good sense tells one to draw it.

[15] The Appellant’s evidence was that he rarely, if ever, opted for the Employer’s offer of a room and the sum of $62.50 daily meal allowance because he preferred to cook his own meals using the Employer’s option of the $135.00 living-out allowance. The Respondent argued that the overtime meal allowances were unreasonable based on the auditor’s findings that they were in excess of $25

and could be paid in addition to the daily living-out allowance for meals with the Appellant potentially receiving in excess of $100.00 daily for meal expenses. However, the Appellant testified that after he paid for a room, he had approximately $20 to $30 remaining for meals per day and that, on many occasions, he had to personally subsidize the cost of his food. The Appellant's testimony, both in respect to the circumstances for payment of overtime meal allowances and in respect to the higher food prices at remote work locations, was not successfully challenged on cross-examination. I see no reason why the term "travel expenses" cannot be interpreted to include these meal expenses, when they are reasonable and provided at the remote work location. Even if the Appellant had opted for the room and $62.50 daily meal allowance, I would have reached the same conclusion.

[16] I turn now to the amounts in issue respecting travel allowances in 2014 and 2015. The three-prong test set out in the decision in *MacDonald*, for determining if an amount is taxable as an allowance under subparagraph 6(1)(b) of the *Act*, also applies to the travel allowances.

[17] The Respondent submits that the Appellant must include in income the travel allowances because, like the overtime meal allowances, they are caught by the test set out in the decision in *MacDonald*. The Respondent pointed out that the allowances were a predetermined arbitrary amount established by the Employer for the specific purpose of travelling to and from the work site and without the employees having to account for the amounts to their Employer. The Respondent also submits that the only two exceptions to the general rule in paragraph 6(1)(b) that could apply to exclude these travel allowances are contained at subparagraph 6(1)(b)(vii.1) and subsection 6(6):

> **Amounts to be included as income from office or employment**
>
> 6(1) 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
>
> …
>
>> (b) all amounts received by the taxpayer in the year as an allowance for personal or living expenses or as an allowance for any other purpose, except
>>
>> …

(vii.1) reasonable allowances for the use of a motor vehicle received by an employee (other than an employee employed in connection with the selling of property or the negotiating of contracts for the employer) from the employer for travelling in the performance of the duties of the office or employment.

Employment at special work site or remote location

6(6) Notwithstanding subsection 6(1), in computing the income of a taxpayer for a taxation year from an office or employment, there shall not be included any amount received or enjoyed by the taxpayer in respect of, in the course or by virtue of the office or employment that is the value of, or an allowance (not in excess of a reasonable amount) in respect of expenses the taxpayer has incurred for,

(b) transportation between

(i) the principal place of residence and the special work site referred to in subparagraph 6(6)(a)(i), or

(ii) the location referred to in subparagraph 6(6)(a)(ii) and a location in Canada or a location in the country in which the taxpayer is employed,

in respect of a period described in paragraph 6(6)(a) during which the taxpayer received board and lodging, or a reasonable allowance in respect of board and lodging, from the taxpayer's employer.

[18] Subparagraph 6(1)(b)(vii.1) exempts allowances for the use of a vehicle, provided the amounts are reasonable for "travelling in the performance of duties of the office or employment".

[19] There is well-established jurisprudence (*Hogg v Canada*, 2002 FCA 177, *McCreath v The Queen*, 2008 TCC 595 and *Smith v Canada*, 2019 FCA 175) that the travel expenses, between a taxpayer's residence and his place of employment, are personal expenses which are not deductible. There are several cases which have established exceptions to this general principle, where the taxpayers' residences were found to be essential places of business as mandated by their employer (*Campbell v R*, 2003 TCC 160; *Hoedel v R*, 1986 DTC 6535). Since the facts before me do not bring the Appellant within these noted exceptions, the travel allowances, that the Appellant received in 2014 and 2015, cannot be exempt under subparagraph 6(1)(b)(vii.1).

[20] The second provision that could potentially exclude the travel allowances from being a taxable benefit to be included in income is paragraph 6(6)(b) of the *Act* which addresses employment at a special work site or remote location. These remaining travel allowance amounts will be exempt from income if the Employer pays such amounts for an employee's travel from his residence to the special work site. In respect to this provision, there were two categories of allowances in these appeals: those associated with the Neucel work site and those associated with the remaining work sites. The Neucel site was located in the Appellant's hometown and located seven kilometres from his residence. The Appellant agreed that he was able to return on a daily basis to his home from this site. Therefore, the Neucel site is not a "special remote work site" as contemplated by subsection 6(6) because he was able to return to his home daily from the work site. The travel allowances in respect to the Neucel work site totalled $2,630.40 in 2014 and $1,672.50 in 2015. The Appellant testified that he did not dispute the inclusion in his income of the travel allowances paid to him respecting the Neucel work site and, as a result, did not submit Form TD4-E for these amounts. The only concern that the Appellant expressed was that he was being "double-taxed" in respect to the Neucel work site allowances. There was no evidence before me, however, that this had, in fact, occurred.

[21] With respect to the balance of the travel allowance amounts ($6,717.61 in 2014 and $4,625 in 2015) which the Employer paid to all employees commencing at a common departure location, but not the employees' residence, to the remote work site, the Respondent's argument was the following:

> … we submit that this portion of the travel allowance does not come within 6(6)(b). The main reason is the allowance was determined using Burnaby City Hall not the appellant's principal place of residence. Therefore, the location of the employee's principal residence was not considered in determining the allowance. We submit that an allowance cannot be in respect of transportation between the appellant's principal place of residence and a special work site if the principal place of residence is not even considered in determining the allowance.
>
> (Transcript, page 147, lines 8-18)

[22] The question is whether the calculation of a travel allowance to a remote work location must be based on a commencement point, being an employee's principal place of residence, for paragraph 6(6)(b) to apply to exempt the allowance from being included in income as a taxable benefit. In other words, does the Employer's decision to use a common departure location for all employees, which in these appeals was Burnaby City Hall, prevent the employees from

utilizing this provision, which explicitly refers to transportation between "the principal place of residence" and the special work site.

[23] Clause 19.01(c)(i) of the Collective Agreement instructs the Employer to pay to its employees a terminal travel allowance according to the most direct route from the City Hall to the out-of-town work project. No doubt this was implemented so that the Employer could avoid calculating and paying large numbers of employees for a variety of travel distances from individual residences to the remote site. Respondent counsel noted that this argument has not been previously considered by this Court.

[24] Counsel referred to decisions of this Court where the allowance was determined using the principal place of residence. In *Agostini v R*, 2009 TCC 87, Lamarre J., as she was then, concluded that a transportation allowance paid for kilometres travelled from the taxpayer's principal place of residence to the special work site met the test set out in paragraph 6(6)(b) and the amount was not taxable. She did not address whether this provision could be utilized if the taxpayer's principal place of residence was not used in the calculation of the allowance. In *McEachern v R*, 2018 TCC 232, Masse J. held that an employee can exclude the allowance from income pursuant to this provision only if the transportation is "between the employee's principal place of residence and the special work site" (para. 16). The taxpayer in *McEachern* drove from his principal residence in New Brunswick to a pick-up point in Alberta where his employer paid for an airline charter to take him to the remote work site. The travel allowance he received was to assist with the travel costs between his residence and the pick-up point. The Court held that the allowance was paid to transport the employee from his residence to a pick-up point only and not to a special work site.

[25] In the present appeals, the issue is not whether the travel allowance was paid in respect to a special work site as in *McEachern* but whether it was paid from the Appellant's principal place of residence. The wording in subparagraph 6(6)(b)(i) is unambiguous. I cannot extend the term "principal place of residence" to include a pick-up point that is designated by the Employer and from which all employees depart. The provision is clear in its intent. It is unfortunate that the Employer chose to pay travel allowances in this manner although it was likely done for simplicity in bookkeeping.

[26] As a result, the Appellant cannot avail himself of the exclusion set out in subparagraph 6(6)(b)(i). The Minister properly included the amounts respecting the travel allowances in the Appellant's income as taxable benefits in the 2014 and

2015 taxation years. The Appellant will be entitled, however, to the exemption for the overtime meal allowances paid pursuant to subparagraph 6(1)(b)(vii). The appeals will be allowed, without costs, in respect to the overtime meal allowance amounts in both the 2014 and 2015 taxation years.

Signed at Vancouver, British Columbia, this 5th day of February 2020.

"Diane Campbell"

Campbell J.

CITATION:	2020 TCC 23
COURT FILE NO.:	2019-623(IT)I
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APPEARANCES:

For the Appellant:	The Appellant himself
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