

Docket: 2012-4842(IT)G

BETWEEN:

IAN LEITH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 21 and 22, 2015, at Toronto, Ontario.

Before: The Honourable Justice David E. Graham

Appearances:

Counsel for the Appellant: Louise R. Summerhill

Counsel for the Respondent: Jenny P. Mboutsiadis

JUDGMENT

The Appeal of the Appellant's 2006 and 2007 tax years is dismissed.

Costs are awarded to the Respondent. If the parties fail to reach an agreement on costs within 30 days, the parties may file and serve written submissions on costs within 30 days thereafter.

Signed at Vancouver, Canada, this 3rd day of December, 2015.

“David E. Graham”

Graham J.

Citation: 2015 TCC 314
Date: 2015 12 03
Docket: 2012-4842(IT)G

BETWEEN:

IAN LEITH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Graham J.

[1] Ian Leith is an investment advisor with BMO Nesbitt Burns. In his 2006 and 2007 tax years, Mr. Leith claimed various deductions from his employment income. The Minister of National Revenue denied those deductions for a number of reasons and Mr. Leith appealed¹. Mr. Leith also claimed farming losses in his 2006 and 2007 tax returns. The Minister denied those losses on the basis that Mr. Leith was not engaged in the business of farming. The Minister takes the position that Mr. Leith's farming activities were a personal endeavour. Mr. Leith has appealed the denial of his farming losses².

Employment Expenses

[2] The issues that I must determine for the employment expenses are as follows:

¹ Mr. Leith made various concessions at trial with the result that the only employment expenses left in issue were \$5,804 in accounting fees in 2006, \$70,880 in accounting, consulting and client referral fees in 2007 and \$5,034 in advertising and promotion expenses in 2007.

² Mr. Leith had also appealed in respect of the denial of losses from a property rental business in his 2006 and 2007 tax years. He conceded that issue at the start of the trial.

- a) Did Mr. Leith comply with his obligations under the *Income Tax Act* regarding the provision of T2200 *Declaration of Conditions of Employment* forms?
- b) If Mr. Leith complied with his obligations regarding the provision of T2200's, did he incur the employment expenses for the purpose of earning income from employment?
- c) If Mr. Leith incurred the employment expenses for the purpose of earning income from employment, did he meet the remaining conditions set out in paragraph 8(1)(f) of the *Act* that would allow him to deduct those expenses?

Did Mr. Leith comply with his obligations regarding the provision of T2200's?

[3] Subsection 8(1) allows certain employees to deduct certain expenses from their employment income. Subsection 8(10), places certain restrictions on those deductions. It states:

An amount otherwise deductible for a taxation year under paragraph (1)(c), (f),(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.

[emphasis added]

[4] The prescribed form for the purposes of subsection 8(10) is a T2200 *Declaration of Conditions of Employment* form. Mr. Leith did not file T2200's with his 2006 and 2007 tax returns. It would appear on the face of subsection 8(10) that a failure to file a T2200 with a tax return would be fatal to a claim to deduct expenses pursuant to any of the paragraphs described in subsection 8(10). However, as set out below, I find that this is not the case.

[5] The fact that Mr. Leith did not file T2200's with his tax returns is not surprising. The forms themselves specifically told him that he did not have to do so. The second sentence of the T2200's clearly states that "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."

[6] Subsection 220(2.1) of the *Act* states:

Where any provision of this Act or a regulation requires a person to file a prescribed form, receipt or other document, or to provide prescribed information, the Minister may waive the requirement, but the person shall provide the document or information at the Minister's request.

[7] I find that the second sentence of the T2200 form has the effect under subsection 220(2.1) of waiving the requirement under subsection 8(10) for a taxpayer to file a T2200 with his or her tax return so long as the taxpayer provides the T2200 to the Minister upon request. Accordingly, Mr. Leith was not required to file T2200's with his 2006 and 2007 tax returns and his failure to do so is not fatal to his ability to deduct the employment expenses.

[8] Carol Nourdine was the CRA auditor assigned to audit Mr. Leith. Ms. Nourdine testified at trial. I found her to be a credible witness. She stated that she had asked Mr. Leith's accountant to provide her with his T2200's for 2006 and 2007. She identified two T2200's that she had received from Mr. Leith's accountant following that request³. I find that the provision by Mr. Leith's accountant to Ms. Nourdine of those T2200's satisfies the condition in subsection 220(2.1) that the forms be provided at the Minister's request.

[9] Based on all of the foregoing, I find that Mr. Leith has satisfied his obligations pursuant to subsection 8(10) regarding the provision of T2200's.

Did Mr. Leith incur the employment expenses for the purposes of earning income from employment?

[10] The Minister made assumptions of fact that Mr. Leith did not incur the employment expenses in respect of any employment or business activities⁴. While Mr. Leith testified at length about the expenses that he says incurred for employment purposes, I did not find him to be credible. Accordingly, I find that Mr. Leith failed to demolish the Minister's assumptions of fact and thus that he is not entitled to deduct the employment expenses.

[11] My findings as to Mr. Leith's credibility were based, in part, on various implausible statements that he made in his testimony regarding specific expenses but, more importantly, on two sets of documents that were entered into evidence: altered T2200's and backdated versions of his personal calendars.

³ Exhibits R-2 and R-3

⁴ Reply to the Amended Notice of Appeal, paragraphs 13.12 and 13.19

Altered T2200's

[12] Mr. Leith entered a set of T2200's as exhibits at trial⁵ that differed from the T2200's that his accountant had provided to Ms. Nourdine. I will refer to the set of T2200's Mr. Leith entered as exhibits as the "Trial T2200's" and the set that was provided to Ms. Nourdine as the "Audit T2200's". Ms. Nourdine testified that the Audit T2200's were the only T2200's that she received from Mr. Leith. Mr. Leith made no mention of the Audit T2200's in his direct testimony.

[13] John Casey was the branch manager of Mr. Leith's BMO Nesbitt Burns branch in 2006 and 2007 and was the individual who signed Mr. Leith's T2200's. Mr. Casey was called as a witness. I found him to be credible. He explained the process by which T2200's were prepared in the branch in 2006 and 2007. BMO Nesbitt Burn's accounting department would provide the branch with the necessary forms and a memo explaining how they should be filled out. The branch administrator would fill the forms out in accordance with the memo. The completed T2200's would then be distributed to the investment advisors. The investment advisors would review the forms and, if necessary, make changes. The investment advisors would then give the forms to Mr. Casey. He would review the forms, sign them and return them to the investment advisors. By signing the T2200's, Mr. Casey was certifying on behalf of BMO Nesbitt Burns that they were, to the best of his knowledge, correct and complete. Based on Mr. Casey's evidence, I accept that I should not be alarmed if Mr. Leith's T2200's for 2006 and 2007 contain alterations made by Mr. Leith so long as I am comfortable that the alterations occurred before Mr. Casey signed the forms.

[14] Mr. Leith made handwritten alterations to all of the T2200's. He made changes to the Audit T2200's that are different than those he made to the Trial T2200's. Mr. Casey's signature appears on both the Audit T2200's and the Trial T2200's. It was implicit in Mr. Casey's testimony that he would not have signed more than one T2200 for a given investment advisor for a given year or approved a previously signed form after it had been amended⁶. Since the Audit T2200 for each year is different from the Trial T2200 for that same year, they should not both bear Mr. Casey's signature. There are two possible explanations. Either one of those

⁵ Exhibit A-1, Tabs 2 and 11

⁶ When asked which of the two forms he had signed for each year, Mr. Casey either indicated the form that he thought he had signed or stated that he did not know. He did not say that he had signed, or may have signed, both nor did he say that he may have approved changes to the form after he signed it.

documents was altered after Mr. Casey signed it or both of them were altered after Mr. Casey signed some other original document. By altering the documents after Mr. Casey signed them, Mr. Leith rendered Mr. Casey's certification invalid. More importantly, by presenting such documents as having been properly certified, Mr. Leith seriously damaged his credibility. The details of the alterations and my conclusions arising therefrom are set out below.

[15] The Audit T2200 for 2006 contains one handwritten alteration made by Mr. Leith. Question 6 on the T2200 asks whether the employee was required to pay certain types of expenses. The response prepared by BMO Nesbitt Burns indicates that Mr. Leith was required to pay "sales & promotions & entertainment" expenses. Mr. Leith has added the words "EDUCATION COACHING" to the response to Question 6. It is not possible to determine from the 2006 Audit T2200 whether this addition was made before or after Mr. Casey signed it.

[16] The Trial T2200 for 2006 contains a number of other handwritten alterations that were made by Mr. Leith:

- a) Question 8 asks whether the employee was required to be away for at least 12 consecutive hours from the place where he or she normally reported for work and, if so, how frequently. A box marked "No" beside this question was ticked on the 2006 Audit T2200. On the 2006 Trial T2200, the tick in the "No" box has been scratched out and a new tick placed in the "Yes" box. I conclude from this that the 2006 Audit T2200 cannot have been created by altering the 2006 Trial T2200. The words "AS REQUIRED IN HIS DETERMINATION" have also been added to describe the frequency of Mr. Leith's travel.
- b) The words "EDUCATION COACHING" added by Mr. Leith to Question 6 in the 2006 Audit T2200 are not present in the 2006 Trial T2200. The words "TRAVEL + AUTO + EXPENSES" appear in their place.
- c) Question 2 asks where the employee was required to travel. The 2006 Audit T2200 contains the following answer prepared by BMO Nesbitt Burns: "ONTARIO". The 2006 Trial T2200 contains the following additional phrase: "+CANADA + MASS + CALIFORNIA WHERE HE IS LICENSED + WHERE HE HAS CLIENTS + WITH CLIENTS"

[17] I conclude from the above that either the 2006 Trial T2200 was prepared by altering the 2006 Audit T2200 after it was signed by Mr. Casey or the 2006 Audit

T2200 and the 2006 Trial T2200 were prepared by altering a common original T2200 after that original document was signed by Mr. Casey. Either way, the inescapable conclusion is that Mr. Leith altered the 2006 Trial T2200 after it was signed by Mr. Casey. He may also have altered the 2006 Audit T2200 after it was signed.

[18] The Audit T2200 for 2007 contains the following handwritten alterations made by Mr. Leith:

- a) Mr. Leith's address has been changed.
- b) The field for Mr. Leith's job title has been filled in with the description "INVESTMEN ADVISOR PORTFOLIO MANAGER".
- c) Question 2 asks where the employee was required to travel. The 2007 Audit T2200 contains the following answer prepared by BMO Nesbitt Burns: "Ontario". The phrase "+ BC +" has been added to this description.
- d) Question 6 asks whether the employee was required to pay certain types of expenses. The response prepared by BMO Nesbitt Burns indicates that Mr. Leith was required to pay "sales, promotions, entertainment" expenses. The phrase ", TRAVEL, AUTO EXPENSES" has been added to this description.

[19] It is not possible to determine from the 2007 Audit T2200 whether these additions were made before or after Mr. Casey signed it.

[20] The Trial T2200 for 2007 contains a number of additional handwritten alterations:

- a) Mr. Leith has added the following additional phrase to the response to Question 2: "CANADA WHERE HE IS LICENSED + WHERE HE HAS CLIENTS + WITH CLIENTS". This phrase follows the phrase "+ BC +", which appears in the 2007 Audit T2200⁷.

⁷ I am unable to conclude anything about the sequencing of these documents from this fact as it is possible that the 2007 Trial T2200 was amended by adding the phrase starting with the word "CANADA" to the existing addition in the 2007 Audit T2200 or that the 2007 Audit T2200 was amended by erasing the phrase starting with the word "CANADA" from the 2007 Trial T2200. It is also possible that both documents were

- b) Question 8 asks whether the employee was required to be away for at least 12 consecutive hours from the place where he or she normally reported for work and, if so, how frequently. The words “AS REQUIRED IN HIS DETERMINATION” have been added to describe the frequency of Mr. Leith’s travel.
- c) Mr. Leith’s social insurance number has been added.

[21] I conclude from the above that either one or both of the 2007 Audit T2200 and the 2007 Trial T2200 were altered by Mr. Leith after being signed by Mr. Casey.

[22] Mr. Leith denied altering the T2200’s for the purpose of his dispute with the Minister. He appeared to claim that the alterations that he made were for the purpose of reflecting the reality of his employment situation rather than for the purpose of affecting the outcome of the trial. It was as if Mr. Leith wanted me to believe that he had an altruistic interest outside of his tax dispute in having the T2200’s reflect a more accurate picture of what occurred. The simple fact is that in his direct testimony Mr. Leith falsely presented the 2006 Trial T2200 as having been altered before Mr. Casey signed it, failed to draw my attention to the fact that he had provided a different set of T2200’s to his accountant and failed to draw my attention to the fact that one or both of the 2007 T2200’s had been altered after Mr. Casey signed them. On cross-examination when faced with the two differing sets of T2200’s, Mr. Leith was evasive and vacillated in his explanations of what had occurred. It was unclear exactly what Mr. Leith’s position was. At first he appeared to insist that any alterations he had made had been approved by Mr. Casey and had been made before April 30 of the years in question. This, of course, does not explain why he would have given a different set of documents to his accountant than the documents he filed in Court. At another point in his testimony he insisted that the Audit T2200’s were incorrect although he did not explain why he would have given incorrect T2200’s to his accountant. Finally he appeared to concede that he may have altered some of the T2200’s after Mr. Casey signed them but insisted that those alterations had only been made for the purpose of reflecting the truth of his employment situation. The overall impression that I had was that Mr. Leith was drowning in his own deceits and was desperately grasping at anything that he thought might save him. A witness who falsely presents altered documents either to the CRA or as evidence at trial cannot reasonably expect to

either be found to be credible or to be found to have presented the documents for a reason other than to influence the outcome of his or her dispute with the Minister.

[23] As a side note, it is possible that at least some of the alterations to the Audit T2200's were made by Mr. Leith after Mr. Casey signed them. However, based on Mr. Casey's testimony as to how T2200's were prepared, it is also possible that those alterations were made before he signed them. The Minister did not make any assumptions of fact on this point. I am unable to determine simply by looking at the T2200's whether the Audit T2200's had been altered before Mr. Casey signed them. Had I concluded that they had, I would have found against Mr. Leith on the previous issue since providing the Minister with false T2200's would not have satisfied Mr. Leith's obligations under subsection 220(2.1) to provide T2200's on request.

Backdated Calendars

[24] Mr. Leith also filed into evidence, two marked up calendars: one for 2006 and one for 2007. He testified that he had printed those calendars at the end of the years in question and noted in handwriting the mileage that he had driven for employment purposes on the relevant days. Mr. Leith testified in detail about how he would note the mileage on the back of meal receipts, collect the receipts in a bag until the end of the month, then transfer the receipts to monthly envelopes and finally, at year end, transfer the information from the back of the receipts to the calendar.

[25] The date May 14, 2010 appears in the bottom right hand corner of both of the calendars. It seemed highly unlikely that such a date would appear on calendars supposedly printed in 2006 and 2007. To ensure that I was not drawing an incorrect inference from that date, at the end of Mr. Leith's testimony I asked him what the date was. He stated that it was the date that the calendars were printed. Not only does that contradict his own testimony regarding when he printed the calendars, it also calls into question his entire detailed description of how he maintained his records and suggests that he was attempting to backdate evidence. The fact that the auditor first spoke to Mr. Leith's accountant on May 12, 2010 and the calendars were printed on May 14, 2010, further suggests that the calendars were created not in the course of Mr. Leith's usual record keeping practices but rather to satisfy the auditor. All of the foregoing affects my view of Mr. Leith's credibility.

Did Mr. Leith meet the remaining tests in paragraph 8(1)(f)?

[26] Given my conclusion that Mr. Leith has failed to demolish the Minister's assumptions of fact that he incurred the employment expenses for the purposes of earning employment income, it is not necessary for me to consider whether Mr. Leith met the remaining tests for the deduction of those expenses under paragraph 8(1)(f).

Farming Losses

[27] In 2006, Mr. Leith purchased a farm located in Duncan, Ontario. The farm buildings and fencing were in a state of disrepair. He spent a significant amount of money repairing and improving the property. The losses that he claims are mostly related to those costs.

[28] Mr. Leith submits that he was in the business of farming and is thus entitled to deduct the full amount his farming losses against his employment income.

[29] I do not accept that Mr. Leith was in the business of farming. While Mr. Leith denies a personal motivation for the purchase of the property, given my conclusions regarding his credibility, I am not prepared to accept his assertions at face value. I find that there was a significant personal element to the property. There is a house on the property. Mr. Leith testified that it was his ultimate intention to live full time on the property. The property is located approximately 20 minutes from both the Blue Mountain and Beaver Valley ski resorts. Mr. Leith was an avid skier, although he can no longer ski. He gave vague testimony regarding when he stopped being able to ski but I note that the 2007 calendar that he filed has him skiing in what appears to be Denver for four days in January. Based on this, I conclude that he was able to ski when he purchased the property in 2006 and continued to ski in 2007. Mr. Leith testified that he spent most weekends at the property. Mr. Leith has a number of friends in the area. While some of those individuals may have been clients or potential clients, it appears that their connection was far more social in nature.

[30] Given the presence of a personal element in respect of the property, it is appropriate for me to consider whether Mr. Leith's predominant intention was to make a profit from farming and whether the farming that he engaged in was carried out in accordance with objective standards of businesslike behaviour⁸.

⁸ *Stewart v. The Queen* 2002 SCC 46

[31] Mr. Leith did not own, buy or sell any cattle in 2006 or 2007. He did not breed any cattle in those years. He did not raise crops. He did not purchase any farming inventory or feed. He did not have a written business plan. He testified that he knew exactly what he planned to do but he did not provide any details as to what that was nor did he provide any financial projections as to how or when the farm would become profitable. Mr. Leith provided no evidence as to his farming knowledge or, to the extent that it was lacking, how he intended to gain that knowledge. While he made the fields on the property available to some neighbours' cattle in exchange for \$1,000 per year, those cattle did not use the barn and Mr. Leith's involvement with the cattle extended, at most, to checking in on them on weekends when he was at the property.

[32] Based on all of the foregoing, I conclude that in 2006 and 2007 Mr. Leith's farming activities were a personal endeavour. At best he was preparing the property for a potential future use in an as yet uncommenced farming business.

[33] Mr. Leith made alternative submissions regarding restricted farming losses. In light of my conclusion that he was not engaged in the business of farming, it is not necessary for me to consider those submissions.

Costs:

[34] Costs are awarded to the Respondent. Counsel for the Respondent asked that the Respondent be given an opportunity to make submissions on costs. If the parties fail to reach an agreement on costs within 30 days, the parties may file and serve written submissions on costs within 30 days thereafter.

Signed at Vancouver, Canada, this 3rd day of December, 2015.

“David E. Graham”

Graham J.

CITATION: 2015 TCC 314

COURT FILE NO.: 2012-4842(IT)G

STYLE OF CAUSE: IAN LEITH AND HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 21, 22, 2015

REASONS FOR JUDGMENT BY: The Honourable Justice David E. Graham

DATE OF JUDGMENT: December 3, 2015

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