

Docket: 2006-2678(IT)I

BETWEEN:

JOHN NAGY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 3, 2007, at Toronto, Ontario

Before: The Honourable D.G.H. Bowman, Chief Justice

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Josh Hunter

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2004 taxation year is allowed and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the distance between the appellant's old residence and his new work location is more than 40 kilometres greater than the distance between his new residence and his new work location and that the appellant is entitled to a deduction of \$24,651 under subsection 62(1) of the *Income Tax Act*.

The appellant is entitled to his costs, if any, in accordance with the tariff.

Signed at Ottawa, Canada, this 9th day of July 2007.

“Donald G.H. Bowman”

Bowman C.J.

Citation: 2007TCC394
Date: 20070709
Docket: 2006-2678(IT)I

BETWEEN:

JOHN NAGY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bowman, C.J.

[1] This appeal is from an assessment for the appellant's 2004 taxation year. He claimed and was denied a deduction for moving expenses of \$24,651 under subsection 62(1) of the *Income Tax Act*.

[2] On February 14, 2004, the appellant started a new job with Counterforce Inc. which was located at 1220 Sheppard Avenue East, North York, Ontario (the "new work location"). At that time he lived at 18803 Winston Churchill Boulevard, Erin, Ontario (the "old residence"). On July 17, 2004, the appellant moved to 210 Billings Crescent, Newmarket, Ontario (the "new residence").

[3] Subsection 62(1) of the *Act* reads:

62. (1) Moving expenses — There may be deducted in computing a taxpayer's income for a taxation year amounts paid by the taxpayer as or on account of moving expenses incurred in respect of an eligible relocation, to the extent that

(a) they were not paid on the taxpayer's behalf in respect of, in the course of or because of, the taxpayer's office or employment;

(b) they were not deductible because of this section in computing the taxpayer's income for the preceding taxation year;

(c) the total of those amounts does not exceed

(i) in any case described in subparagraph (a)(i) of the definition "eligible relocation" in subsection 248(1), the taxpayer's income for the year from the taxpayer's employment at a new work location or from carrying on the business at the new work location, as the case may be, and

(ii) in any case described in subparagraph (a)(ii) of the definition "eligible relocation" in subsection 248(1), the total of amounts included in computing the taxpayer's income for the year because of paragraphs 56(1)(n) and (o); and

(d) all reimbursements and allowances received by the taxpayer in respect of those expenses are included in computing the taxpayer's income.

[4] The definition of eligible relocation in section 248 is as follows:

248. (1) Definitions — In this Act,

...

"eligible relocation" means a relocation of a taxpayer where

(a) the relocation occurs to enable the taxpayer

(i) to carry on a business or to be employed at a location in Canada (in section 62 and this subsection referred to as "the new work location"), or

...

(b) both the residence at which the taxpayer ordinarily resided before the relocation (in section 62 and this subsection referred to as "the old residence") and the residence at which the taxpayer ordinarily resided after the relocation (in section 62 and this subsection referred to as "the new residence") are in Canada, and

(c) the distance between the old residence and the new work location is not less than 40 kilometres greater than the distance between the new residence and the new work location

except that, in applying subsections 6(19) to (23) and section 62 in respect of a relocation of a taxpayer who is absent from but resident in Canada, this definition

shall be read without reference to the words "in Canada" in subparagraph (a)(i), and without reference to paragraph (b);

[5] In other words a move is only an "eligible relocation" entitling the taxpayer to a deduction of moving costs if the distance from the old residence to the new work location is 40 kilometres or more greater than the distance from the new residence to the new work location.

[6] Expressed as a formula, where A is the distance from the old residence to the new work location and B is the distance from the new residence to the new work location if $A - B$ is 40 kilometres or more the move is an eligible relocation. If $A - B$ is less than 40 kilometres the move is not an eligible relocation.

[7] The appellant calculates the difference between A and B to be 42.3 kilometres, as follows:

Support for moving expense objection for John Nagy

Directions from old residence to work	KM's
18803 Winston Churchill Blvd south to Charleston Sideroad	0.8
Charleston Sideroad east to Airport Road	16.4
Airport Road south to Hwy 407	29.5
Hwy 407 east to Hwy 404	29.2
Hwy 404 south to Sheppard Ave.	7.3
Sheppard Ave. west to 1220 Sheppard Ave. East	<u>2.2</u>
	<u>85.4</u>
Directions from new residence to work	
210 Billings Crescent south to Bristol Road	0.4
Bristol Road east to Main Street	1.2
Main Street north to Green Lane	0.5
Green Lane east to Hwy 404	3.2
Hwy 404 south to Sheppard Ave	35.6
Sheppard Ave. west to 1220 Sheppard Ave. East	<u>2.2</u>
	<u>43.1</u>
Difference in distance	<u>42.3</u>

[8] The respondent calculated the difference between A and B to be 34.6 kilometres, on the basis that A is 72.3 kilometres and B is 37.7 kilometres.

[9] I do not propose to compare the appellant's and the respondent's calculations of B. There is a difference of 5.4 kilometres. Indeed the calculation that the respondent uses in the assessment is 37.7 kilometres (Tab 5 in Exhibit R-1). This is actually shorter than Mr. Nagy's calculation of 43.1 kilometres.

[10] The respondent argues, based upon the Federal Court of Appeal's decision in *Giannakopoulos v. M.N.R.*, 95 DTC 5477, that the shortest route, as calculated on a computer generated route by MSN Maps and Directions, should be used. In *Giannakopoulos* the Federal Court of Appeal rejected the remarkably inappropriate and unrealistic notion followed by the Tax Court of Canada that "distance" meant distance measured in a straight line or colloquially "as the crow flies". It is surprising that this remarkable idea was ever adopted in the Tax Court of Canada and it was, in my respectful opinion, rightly rejected by the Federal Court of Appeal. Marceau J.A.'s decision reads in part as follows:

In coming to its conclusion regarding the appropriate measuring technique, the Tax Court of Canada, in its early decisions, relied on two antiquated English cases, [*Lake v. Butler* (1855), 24 Law J Rep (NS) 273; *Jewel and Another v. Stead* (1856), 25 Law J Rep (NS) 294.] one of which involved a court's territorial jurisdiction, the other the appropriate placement of a toll gate. Neither of these cases had any relation to a taxpayer travelling to work and, because of that, neither of them, in my opinion, can be adequately applied to the situation addressed by subsection 62(1).

Subsection 62(1) permits a taxpayer to deduct moving expenses when he moves closer to a new workplace. An employee must live within a reasonable distance of his work. When he accepts a new position, the employee may have to move in order to remain within a practical commuting distance of his job. Subsection 62(1) recognizes that relocation is a legitimate work-related expense. In order to prevent the provision from being invoked when a taxpayer simply desires a change in residence, the provision requires that the move bring the taxpayer at least forty kilometres closer to work. Usually, a taxpayer travels to work using ordinary routes of public travel, i.e. roads, highways, railways. In determining whether the taxpayer has really moved forty kilometres closer to work, it only makes sense to measure the distance he has moved using real routes of travel. A realistic measurement of travelling distance is necessary in order to give effect to the purpose of the provision. The straight line method bears no relation to how an employee travels to work. It is illogical to apply this technique to a provision which exists to recognize work related relocation expenses. It leads to absurd results where the old residence and the new workplace are separated by a body of water. A taxpayer who moves across a river to be closer to his workplace may have only moved a few miles "as the crow flies" but may actually be several dozen miles closer to work. In fact, this is exactly what happened in *Donald Cameron v. M.N.R.* [93 DTC 437, [1993] 1 C.T.C. 2745] wherein the

taxpayer moved across the Ottawa River from Aylmer, Quebec to Kars, Ontario. The Tax Court of Canada held that he could not deduct his moving expenses because the distance was less than 40 kilometres using a straight line measurement.

In one case before the Tax Court of Canada, *Estate of the late Jean-Charles Bernier v. M.N.R.*, [90 DTC 1220] Lamarre-Proulx, T.C.J. held herself to be bound by the prior decisions but only after expressing her own discordant personal view. She stated:

In my view, the remedy in subsection 62(1) should be interpreted in relation to the workers, and the distance in question should be measured by the worker's normal route or the route that he would normally take to go from home to his place of work.

While the use of the normal route notion is more realistic and more effectively furthers the purpose of the section, I would not go so far as Lamarre-Proulx, T.C.J. would apparently have been prepared to go, i.e. to accept a measurement based merely on the worker's normal route or the route that he would normally take to go from home to his place of work. Such a subjective approach would introduce a source of uncertainty which might become "a trap for litigation", which was precisely the reason invoked by the judges to explain their adherence to the direct line approach. It is necessary to be more objective. The idea of the shortest route that one might travel to work should be coupled with the notion of the normal route to the travelling public. Thus, the shortest normal route would be a preferable test to the straight line method, [*Jennings v. Menaugh et al.*, 118 Federal Reporter 612, cited by Lamarre-Proulx, T.C.J. where a similar test was used: "the ordinary, normal and shortest route".] for it is both realistic and precise. It also furthers the purpose of the provision. This test would prevent a taxpayer from being expected to use an extraordinary route such as a neglected or unpaved road. It would also leave room to consider travel not only on roads but on ferries and rail lines.

In my introductory remarks, I spoke of a general problem regarding interpretation of the word "distance" in legislative enactments. In common parlance, the word itself, or its equivalent in French, has to be interpreted in relation to the context in which it is used. The "distance" between two steeples in a city or between Ottawa and Paris could not be understood as meaning the same thing as the "distance" between two runners in a marathon. I am of the view that there is no reason to do otherwise when the word is used in the body of a legislative enactment. In my opinion, by applying the straight line rule to the calculation of the distance referred to in subsection 62(1) of the Act, the Tax Court of Canada has interpreted the word without regard to the context and, in so doing, has committed an error of law which must be reversed.

[11] Counsel invites me to read the passage from *Giannakopoulos* as requiring that a mechanical measurement of all possible routes should be made and the

shortest chosen, regardless of whether any reasonable person would follow such a route. The route suggested by the respondent as the shortest involves 18 left turns and 19 right turns and requires travelling on about 40 roads, some rural, as well as driving through the heavily congested City of Brampton. I attach as Schedule A, Tab 4 of Exhibit R-1, which sets out the multiplicity of zigging and zagging that the Crown suggests should be followed to achieve the "shortest" route which it says is mandated by the Federal Court of Appeal. The respondent's approach illustrates simply the triumph of mechanical irrationality over common sense. No rational person would follow such a route. Indeed, anyone trying to follow those instructions would get lost unless he or she had a navigator in the passenger seat giving directions. The approach advocated by the Crown represents an attempt to reverse the salutary effect of the Federal Court of Appeal's decision which endeavours to substitute a measure of common sense and rationality for the unthinking mechanical approach that prevailed prior to *Giannakopoulos*.

[12] The Federal Court of Appeal suggests no such robotic approach. In his reasons Marceau J.A. speaks of a "realistic measurement of travelling distance". He also says that "the idea of the shortest route that one might travel to work should be coupled with the notion of the normal route to the travelling public" (emphasis added). His use of "realistic" and "normal" implies that reason and common sense should play a part in the determination of distance. The 38 turn slalom suggested by the Crown is neither realistic, nor normal, nor reasonable, nor commonsensical. In some ways it is even more nonsensical than the straight line approach. The straight line approach would at least make sense to a crow. The 40 road zigzag approach makes sense to no one.

[13] I turn next to the route down Highway 410 to Highway 401 (Tab 2 of Exhibit R-1) (attached as Schedule B). This route is perhaps a possibility but I can see why Mr. Nagy would try to avoid it. Highway 401 is, on the evidence (and as a matter of common experience if it were something of which the court could take judicial notice) the busiest, most heavily travelled, most congested highway in Canada and quite possibly in North America. However, even if, contrary to my own better judgment I were to say that we had to measure using the Highway 410/401 route where does that get the Crown? The respondent's own evidence is that using that route the distance from 18803 Winston Churchill Boulevard, Erin to 1220 Sheppard Avenue East, North York (A in the formula) is 78.36 kilometres. The respondent's own evidence is also that the distance from 210 Billings Crescent, Newmarket to 1220 Sheppard Avenue East, North York is 37.7 kilometres, 78.36 minus 37.7 is 40.66 kilometres.

[14] I completely reject the 38 turns, 40 road zigzag slalom. This leaves us with either the Crown's figures (40.66) or the appellant's (42.3). On either basis the appellant succeeds.

[15] The appeal is allowed and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the distance between the appellant's old residence and his new work location is more than 40 kilometres greater than the distance between his new residence and his new work location and that the appellant is entitled to a deduction of \$24,651 under subsection 62(1) of the *Income Tax Act*. The appellant is entitled to his costs, if any, in accordance with the tariff.

Signed at Ottawa, Canada, this 9th day of July 2007.

“Donald G.H. Bowman”

Bowman C.J.



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Map

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Start: 18803 Winston Churchill Blvd, Erin ON
 End: 1226 Shepard Ave E, Toronto ON
 Total Distance: 72.3 Kilometers *shortest route*
 Estimated Total Time: 1 hour, 34 minutes

Directions	Kilometers	Map
Start: Depart 18803 Winston Churchill Blvd, Erin ON on CR-25 [RR-19] (South-East)	1.3	<input type="checkbox"/>
1: Turn LEFT (North-East) onto HWY-24 [RR-24]	1.2	
2: Turn RIGHT (South-East) onto Shegus Creek Rd	3.1	<input type="checkbox"/>
3: Turn LEFT (North-East) onto River Rd	0.8	

4: Turn RIGHT (South-East) onto RR-11 [Old Main St]	0.1	<input type="checkbox"/>
5: Keep STRAIGHT onto RR-1 [Mississauga Rd]	6.1	
6: Turn LEFT (North-East) onto RR-12 [Old Base Line Rd]	1.1	<input type="checkbox"/>
7: Turn RIGHT (South-East) onto Creditview Rd	12.7	
8: Turn LEFT (North-East) onto El Camino Way	0.7	<input type="checkbox"/>
9: Turn RIGHT (South-East) onto Braderie Dr	2.1	
10: Road name changes to Perlove Dr	0.7	<input type="checkbox"/>
11: Turn LEFT (East) onto Williams Pky W	2.2	
12: Turn RIGHT (South-East) onto Vudden St W	1.0	<input type="checkbox"/>
13: Turn RIGHT (East) onto Mill St N	0.2	
14: Turn LEFT (North) onto Lorna Ave	0.2	<input type="checkbox"/>
15: Turn RIGHT (South-East) onto Isabella St	0.3	
16: Turn LEFT (North-East) onto David St, then immediately turn RIGHT (South-East) onto Thomas St	0.3	
17: Turn LEFT (East) onto Church St (W)	0.6	<input type="checkbox"/>
18: Turn RIGHT (South-East) onto Scott St	0.2	
19: Bear LEFT (East) onto Nelson St E	0.1	
20: Road name changes to Wilson Ave	0.2	<input type="checkbox"/>
21: Turn RIGHT to stay on Wilson Ave	0.1	
22: Turn LEFT (North-East) onto RR-6 [Queen St E], then immediately turn RIGHT (South-East) onto Trueman St	0.4	
23: Turn LEFT (North-East) onto Eastern Ave	0.4	<input type="checkbox"/>
24: Turn RIGHT (South-East) onto	0.3	

RR-16 [Kennedy Rd S]		
25: Turn LEFT (North-East) onto Orinda Rd	3.1	<input type="checkbox"/>
26: Turn RIGHT (South-East) onto RR-4 [Dixie Rd]	0.3	<input type="checkbox"/>
27: Turn LEFT (North-East) onto Orinda Rd	1.4	<input type="checkbox"/>
28: Turn RIGHT (South-East) onto Bramalea Rd	0.2	<input type="checkbox"/>
29: Turn LEFT (North-East) onto RR-15 [Steeles Ave E]	6.5	<input type="checkbox"/>
30: Turn RIGHT (South-East) onto HWY-50 [Albion Rd]	2.7	<input type="checkbox"/>
31: Road name changes to Albion Rd	1.5	<input type="checkbox"/>
32: Turn LEFT (North) onto Finch Ave W	7.8	<input type="checkbox"/>
33: Turn RIGHT (South) onto Sentinel Rd, then immediately turn LEFT (East) onto Derrydown Rd	1.0	<input type="checkbox"/>
34: Turn LEFT (East) onto Broadoaks Dr	0.2	<input type="checkbox"/>
35: Turn RIGHT (South) onto Keele St	0.3	<input type="checkbox"/>
36: Turn LEFT (East) onto St Regis Crescent	0.3	<input type="checkbox"/>
37: Turn RIGHT to stay on St Regis Crescent	0.2	<input type="checkbox"/>
38: Turn RIGHT (South) onto Tuscan Gate	0.2	<input type="checkbox"/>
39: Turn LEFT (North) onto Sheppard Ave (W)	10.1	<input type="checkbox"/>
40: Turn RIGHT (South) onto Local road(s)	0.2	<input checked="" type="checkbox"/>
41: Turn RIGHT (North) onto Sheppard Ave E	0.2	<input type="checkbox"/>
End: Arrive 1220 Sheppard Ave E, Toronto ON		



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Driving Directions from 18803 Winston Churchill Boulevard, Erin, ON to 1220 Sheppard... Page 1 of 3




18803 Winston Churchill Boulevard
Erin, ON L0N, CA


1220 Sheppard Avenue E
Toronto, ON M2K, CA

Total Est. Time:
1 hour, 0 minutes

Total Est. Distance:
78.36 km *shortest route*

Maneuvers	Distance
1: Start out going NORTHEAST on CHARLESTON SDRD / PROVINCIAL ROUTE 24 / RR-24 toward SHAWS CREEK RD.	8.2 km
2: Turn RIGHT onto HURONTARIO ST / PROVINCIAL ROUTE 10.	24.0 km
3: Turn LEFT onto BOVAIRD DR / PROVINCIAL ROUTE 7.	2.4 km
4: Take the HWY-7 E / HWY-410 S ramp.	0.7 km
5: Merge onto PROVINCIAL ROUTE 410 S.	11.6 km
6: Take the RTE-401 E / HWY-401 E exit toward TORONTO.	1.3 km
7: Merge onto HWY-401 COLLECTORS E.	3.4 km
8: Merge onto HWY-401 EXPRESS E via the exit on the LEFT.	23.7 km
9: Take the exit toward LESLIE ST. / VICTORIA PK. AVE. / WARDEN AVE..	0.4 km
10: Merge onto HWY-401 COLLECTORS E.	0.7 km
11: Take the LESLIE STREET exit- EXIT 373.	0.4 km
12: Take the LESLIE STREET NORTH / LESLIE STREET NORD ramp.	<0.1 km
13: Turn LEFT onto LESLIE ST.	0.9 km
14: Turn LEFT onto SHEPPARD AVE E.	0.1 km

 **15:** Turn RIGHT to stay on SHEPPARD AVE E. <0.1 km

 **16:** End at 1220 Sheppard Avenue E
Toronto, ON M2K, CA

Total Est. Time: 1 hour, 0 minutes Total Est. Distance: 78.36 km

CITATION: 2007TCC394

COURT FILE NO.: 2006-2678(IT)I

STYLE OF CAUSE: JOHN NAGY v. HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: July 3, 2007

REASONS FOR JUDGMENT BY: The Honourable D.G.H. Bowman, Chief Justice

DATE OF JUDGMENT: July 9, 2007

APPEARANCES:

For the Appellant: The Appellant himself
Counsel for the Respondent: Josh Hunter

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: John H. Sims, Q.C.
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