Docket: 2006-2313(IT)I

BETWEEN:

KAREN HENRY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on July 5, 2007, at Toronto, Ontario

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

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Laurent Bartleman

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 2002 and 2003 taxation years are dismissed.

Signed at Ottawa, Canada, this 3rd day of August 2007.

"D.G.H. Bowman"

Bowman C.J.

Citation: 2007TCC451
Date: 20070803
Docket: 2006-2313(IT)I

BETWEEN:

KAREN HENRY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bowman, C.J.

[1] These appeals are from assessments for the appellant's 2002 and 2003 taxation years. In those years the appellant claimed home office expenses and automobile expenses in connection with her work. She did not pursue her claim for home office expenses but she did argue that she was entitled to automobile expenses beyond the amounts received from her employer.

[2] The appellant is a social worker employed by the Peel Regional Municipality. She makes home visits to persons who are on social assistance or are claiming social assistance. For this purpose she is required to use her automobile.

[3] In her return of income for 2002 she claimed automobile expenses (fuel, maintenance, insurance, licence and registration and capital cost allowance) of $10,831.40. This figure was based on her calculation that total kilometres driven in the year were 29,100 of which 27,200 kilometres were for business use

$$\frac{27,200}{29,100} \text{ X } 11,588 = \$10,831.40$$

[4] The 2003 return was not put in evidence but the appellant informed me that the figures were substantially the same in 2003.

[5] I do not regard the figures in her return as particularly reliable. The return was prepared by someone else and seems to have been prepared without adequate consultation with the appellant. For example, she agreed on cross-examination that she drove every day from her home in Scarborough and Brampton a distance of 40 kilometres, or 80 kilometres per day and 400 per week. This would account for about 19,000 kilometres per year. Expenses of travelling to and from work are not deductible. *O'Neil v. The Queen*, 2000 DTC 2409, [2001] 1 C.T.C. 2091; *Ricketts v. Colquhoun*, [1926] A.C. 1.

[6] The appellant did claim automobile expenses from her employer on the basis of 40.5¢ or .41¢ per kilometre. The amounts claimed were always paid by the employer but they were only a small fraction of the total claim made in her income tax return of 27,200 kilometres. If she had claimed and been paid for 27,200 kilometres it would have worked out to over $11,000.

[7] Paragraph 8(1)(*h*.1) of the *Income Tax Act* reads as follows:

> (1) In computing a taxpayer's income for a taxation year from an office or employment, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto:
>
> . . . . .
>
> (*h*.1) where the taxpayer, in the year,
>
> (i) was ordinarily required to carry on the duties of the office or employment away from the employer's place of business or in different places, and
>
> (ii) was required under the contract of employment to pay motor vehicle expenses incurred in the performance of the duties of the office or employment,
>
> amounts expended by the taxpayer in the year in respect of motor vehicle expenses incurred for travelling in the course of the office or employment, except where the taxpayer

> (iii) received an allowance for motor vehicle expenses that was, because of paragraph 6(1)(*b*), not included in computing the taxpayer's income for the year, or
>
> (iv) claims a deduction for the year under paragraph (*f*);

[8] I think the existing state of the law is that receipt of a tax free allowance for motor vehicle expenses, as provided in subparagraph 8(1)(*h*.1)(iii), is not an absolute bar to claiming additional motor vehicle expenses if the amount reimbursed is unreasonably low in relation to the amounts actually incurred.

[9] In *Evans v. R.*, 99 DTC 168, Porter D.J. said:

> [23] However, the argument advanced by the Minister that such an allowance acts as a bar to a claim for expenses relating to different travel not covered by that allowance, could lead to absurd results, which clearly would not be within the contemplation of the legislation and is not supported by the case law on the issue. Say for example, the taxpayer was required as part of his or her employment to drive his own vehicle some 40,000 kilometres in a year and for whatever reason was only reimbursed by the employer for 100 of those 40,000 kilometres. Could it be said, that allowance should act as a bar to claiming as an expense against the employment income, the cost of travelling the remaining 39,900 kilometres. That would be an absurd result, which should be avoided. The allowance might be perfectly reasonable as it relates to the travel for which it was paid but it should have no bearing upon the travel for which it was not paid.
>
> [24] The same principle was dealt with in the *Rozen* case (above), that if a taxpayer is required to use his vehicle for employment purposes, both within a city and outside the city, but is only reimbursed for travel outside the city by way of a non taxable allowance under subparagraph 6(1)(*b*)(vii.1), that taxpayer is still entitled to claim his or her expenses against employment income, for the travel within the city, as long as it meets all the other relevant criteria.
>
> [25] In my view, the section makes complete and adequate sense if given the interpretation that if a taxpayer receives an allowance for motor vehicle expenses which, by reason of paragraph 6(1)(*b*), is not included in his or her taxable income, he or she can claim no further amounts in respect of motor vehicle expenses expended with respect to that same travel (unless "woefully inadequate" as per the *Mina* case above), even if the actual expenses exceeded the allowance for that travel. However, if he or she incurs expenses for travel, other than that covered by the allowance, done in the performance of duties under the contract of employment, express or implied, then the existence of that allowance is not a bar to a claim to set off those other expenses against employment income pursuant to subparagraphs 8(1)(*h*.1)(i) and (ii). In short, the exception under subparagraph

8(1)(*h*.1)(iii) relates only to the expenses of travel for which the allowance was paid and is not a bar to a claim for expenses relating to travel for which it was not paid.

[26] I am fortified in this approach by the words of Strayer, J. in the *Rozen* case (above) where at page 52 he says:

> The fact that there was some reimbursement based on a mileage rate fixed by the employer, with respect to out-of-town use does not prevent the taxpayer's automobile expenses from being within subparagraph 8(1)(*h*.1)(ii): see *Faubert v. M.N.R.*, [1979] C.T.C. 2723: 79 DTC 641 (T.R.B.); *Cival v. The Queen*, [1981] C.T.C. 392 at 399; 81 DTC 5311 at 5316-17 (F.C.T.D.) (reversed on other grounds by the Federal Court of Appeal [1983] C.T.C. 153; 83 DTC 5168) . . .

A little later in the same judgment he said:

I believe also that subparagraph 8(1)(*h*)(ii) can be interpreted somewhat more broadly. Even if the plaintiff were not specifically required to use his car, he was required to pay his travelling expenses incurred by him in the performance of his duties and this would also bring him within the subparagraph. The evidence was clear that to do his job the plaintiff had to go to the offices of a variety of clients. No provision was made for reimbursement for transportation for getting to those offices except with respect to those outside of Vancouver where at least car mileage was allowed. If an employee is obliged to travel to do his work and his employer is not prepared to pay the exact and total cost of transportation, then he must come within the requirements of subparagraph 8(1)(*h*)(ii). This question was not under consideration before the Federal Court of Appeal in *Cival*. On this basis, it is not really very important whether the plaintiff here was obliged to use his car or not; he was obliged to get himself and his papers to the firm's clients and there was no arrangement, at least in the circumstances relevant to this case, whereby the employer undertook to pay the total transportation costs.

[27] The *Rozen* case was cited with approval by Jerome, A.C.J. in the *Mina* case (above), when he said at page 385:

. . . I endorse Mr Justice Strayer's remarks in *Rozen* that where an employee is obliged to travel to do his work, if his employer is not prepared to pay the exact and total costs of transportation, then he must come within the requirements of subparagraph 8(1)(*h*)(ii). It remains to be seen whether the reasonable costs in this situation were covered by the mileage allowance. If not, they are properly deductible under paragraph 8(1)(*h*).

The matter was fully discussed by Justice Rip (as he then was) in *O'Neil v. The Queen*, [2001] 1 C.T.C. 2091.

[10] The appellant relied upon a policy of the Canada Revenue Agency which would apparently interpret the restrictions in paragraph 8(1)(*h*.1) to permit under some circumstances a deduction of automobile expenses beyond those for which the taxpayer received an allowance. This would be the case where the amounts reimbursed were unreasonably low or an allowance was given for only certain expenses. This is consistent with the statements from the cases cited above.

[11] That is not, however, the situation here. The appellant did receive an allowance for motor vehicle expenses that was not included in her income. There is no evidence that the allowance of 40.5¢ or 41¢ per kilometre was unreasonable. Indeed she was paid by her employer the full amount claimed. It is I think a fair inference that if she had claimed more she would have received it.

[12] Moreover, I am not satisfied that the amount claimed by the appellant would be fully deductible even if she were not limited by subparagraph 8(1)(*h*.1)(iii). Roughly 19,000 kilometres were attributable to travelling from her home in Scarborough to her place of employment. As stated above, such expenses are not deductible.

[13] The appeals will therefore be dismissed.

Signed at Ottawa, Canada, this 3rd day of August 2007.

"D.G.H. Bowman"

Bowman C.J.

CITATION:	2007TCC451
COURT FILE NO.:	2006-2313(IT)I
STYLE OF CAUSE:	KAREN HENRY AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	July 5, 2007
REASONS FOR JUDGMENT BY:	The Honourable D.G.H. Bowman, Chief Justice
DATE OF JUDGMENT:	August 3, 2007

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Laurent Bartleman

COUNSEL OF RECORD:

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Firm:	
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