Docket: 2006-1684(IT)I

BETWEEN:

ROBIN ARSENAULT VÉZINA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeals heard on November 29, 2006, and October 9, 2007,
at Sherbrooke, Quebec.

Before: The Honourable Justice Pierre Archambault

Appearances:

| | |
|---|---|
| Agent for the Appellant: | Bruno Vézina |
| Counsel for the Respondent: | Marie-Claude Landry |

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**JUDGMENT**

The appeals from the assessments made under the *Income Tax Act* for the 2001, 2002 and 2003 taxation years are allowed and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment. The appeal pertaining to the year 2000 is dismissed, without costs.

Signed at Ottawa, Canada, this 16th day of November 2007.

"Pierre Archambault"

Archambault J.

Translation certified true
On this 18th day of December 2007.
Monica F. Chamberlain, Translator

Citation: 2007TCC655
Date: 20071116
Docket: 2006-1684(IT)I

BETWEEN:

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Appellant,

and

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[OFFICIAL ENGLISH TRANSLATION]

## REASONS FOR JUDGMENT

Archambault J.

[1] Robin Arsenault Vézina appeals the assessments made on January 6, 2005, by the Minister of National Revenue (**Minister**) for the 2000, 2001, 2002 and 2003 taxation years (**relevant period**). In these assessments, the Minister included the income that Robin earned from performing in the amount of $8,080 for the year 2000, $19,211 for 2001, $21,542 for 2002 and $30,581 for 2003. He also assessed a penalty for each of these years for the late filing of the income tax returns.

[2] The Minister had to proceed with arbitrary assessments because Robin had not filed income tax returns for any of the taxation years, despite a specific request from the Minister. It must be noted that during the relevant period, he was 11-14 years old. At the first hearing, held November 29, 2006, Robin was not present, but was represented by his father, Bruno Vézina. In his testimony, Mr. Vézina stated that he had asked the Ministère de la Sécurité du revenu of Quebec if the amount earned by his son was considered income for the purposes of calculating welfare benefits, to which Mr. Vézina was entitled; the response was negative. As Mr. Vézina attended the hearing without any supporting documentation, or income and loss statements, except for the year 2003, to determine the net income earned by Robin, I exceptionally granted a recess to allow him to provide the Minister with the income tax returns for each of the taxation years in dispute on or before January 29, 2007. He was also required to submit a detailed income statement for the taxation years and the related documentation. Following receipt of these documents, the Minister proceeded to make reassessments on February 14, 2007,

as indicated in a letter from counsel for the Respondent dated February 26, 2007. In this letter, counsel asked the Court to refer Robin's docket to the trial list so that I could hear the parties.

[3] During the hearing held on October 9, 2007, counsel for the Respondent produced Exhibit I-5 entitled "Memorandum," in which an agent for the Respondent took into account the correcting entries made to the assessments for the relevant period. As the Minister accepted a total of $4,019.73 in expenditures for the year 2000, no taxable income remained for that year. Consequently, the hearings pertained only to 2001, 2002 and 2003. In his 2001 assessment, the Minister accepted expenditures of $8,930 out of the $13,063 deduction that was requested. For 2002, the amount increased to $8,845 out of $13,818, and for 2003, to $12,331 out of $18,771.

[4] Essentially, the remaining question for each of these taxation years pertains to the admissibility of four expenditure items: accompaniment expenses, beauty care expenses, clothing expenses and office expenses. The Minister dismissed all of these expenses, except office expenses, where a marginal part relating to pager and cellular phone costs was allowed.

Factual Background

[5] During the relevant period, Robin lived with his parents in Ireland, a municipality situated in the region of Thetford Mines. He received contracts for several roles in film, television and advertising productions. Robin was a member of the Union des artistes and ACTRA, the Union's Canadian counterpart.

[6] Most often, Robin had to travel to Montréal for auditions and, following that, to perform if he was selected for the position. As his grandmother lived in Verdun, he was able to stay with her. According to Mr. Vézina, Robin needed to attend approximately ten auditions to get one job. During his travels, Robin was accompanied by his mother, who had no other paying job at the time.

Analysis

[7] The Minister justifies the denial of the deduction of beauty care, clothing and office expenses by the fact that they represent personal expenses. Essentially, he takes the same position regarding the accompaniment expenses. Here is the explanation given by the agent for the Minister in a memorandum:

[TRANSLATION]
... This invoice is signed by a person who is not at arm's length to the taxpayer who, in this case, is his mother. Concerning the expenses incurred by her, the taxpayer already reimburses the cost of gas and meals. We believe that the accompaniment costs are expenses that are not necessary to earn income. Consequently, the expense is disallowed (18(1)(*h*).

[8] Before performing a detailed analysis of the expenses in dispute, it is useful to remember the relevant passages of the *Income Tax Act* (**Act**):

> **9(1)** [Income –] Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.
>
> **18** **(1)** [General limitations –] In computing the income of a taxpayer from a business or property no deduction shall be made in respect of
> (*a*) [General limitation –] an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property;
> (*b*) [Capital outlay or loss –] an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part;
> ...
> (*h*) [Personal and living expenses –] personal or living expenses of the taxpayer, other than travel expenses incurred by the taxpayer while away from home in the course of carrying on the taxpayer's business;
>
> [Emphasis added.]

[9] It is also useful to remember the courts' interpretation of this type of expense; I would like to bring your attention to two decisions I rendered in 2004: *Riley v. The Queen*, 2003 TCC 409, [2003] 4 C.T.C. 2961 and *Arthurs v. The Queen*, 2003 TCC 636, [2004] 1 C.T.C. 2948.

[10] At the end of the hearing, Mr. Vézina expressed that it was unfair for the Minister to deny certain expenses, notably for clothing, which performers must purchase for their work. He stated that he wanted to solicit the Union des artistes to defend this particular point of view. Under the circumstances, I believe it opportune to recall the comments I made in *Riley*, which, in my opinion, largely apply to this case:

> **7** I would like to state at the outset that these appeals were made under the Informal Procedure and accordingly, by law, these reasons for judgment do not have any precedential value.[2] Although I very rarely make this statement when I render judgments under the Informal Procedure, I do so here because I sense a move by the performing arts industry, at least in British Columbia, to contest the administrative

practices of the Canada Customs and Revenue Agency (**CCRA**). Such a contestation raises difficult issues. Many of the expenses claimed by performing arts artists such as Ms. Riley could be described as borderline because they have a significant personal component. If my perception as to the intention of the performing arts industry is right, I believe that the contestation of the CCRA's administrative practices should be done within the framework of an appeal under the General Procedure as a sort of test case, hopefully with the assistance of a well-qualified tax lawyer. This lawyer would have to introduce all the proper and relevant evidence as to what the expenses are and in what circumstances they were incurred. It is important that this Court not be left with generalities and vague statements as to how the trade is being carried on and as to the purpose for which the expenses were incurred.

**8** Unfortunately, in this case the evidence was not sufficient to convince me that all the expenses were actually incurred for business and not personal consumption purposes. ...

**10** The greatest difficulty facing Ms. Riley in her appeals was dealing with this last-mentioned prohibition in the *Act*. To illustrate the scope of that provision, counsel for the respondent relied on several court decisions. The first, which involved very similar facts to those in this particular case, is *No. 360 v. M.N.R., 16 Tax A.B.C. 31*. This is a case of a taxpayer who was, as described by the Chairman of the Tax Appeal Board, an "actress, commentator and dramatic artist . . . a star of the stage, radio and television - and occasionally of the screen". She was also a person earning income from a business, self-employed, as it is more commonly put. The Chairman acknowledged that her success was due both to "her great talent as an actress and to her charm and grooming".

**11** The actress in question claimed expenses with respect to her clothing and that is the description we find in the Chairman's reasons. The evidence was that she had to provide her own costumes for modern plays and, in most of her television engagements, she was required to furnish her own dresses, which had to be varied and always in the best taste. The appellant in that case also testified that because her viewers complained when she wore the same clothes more than once, she had to buy a large number of dresses and accessories if she wanted to retain her television contracts. As in the case at bar, it was a situation where the dresses could be worn not only for business purposes but also for personal purposes on other occasions. It was even argued that she had to maintain her reputation as a well-dressed woman both on and off the stage.

**12** Based on these facts, the Chairman rendered the following judgment:

> The question here has arisen in a great number of cases heard by this Board. In all such cases it was decided that such expenses were personal expenses and a deduction was not allowed. I find nothing in the present case which would warrant a decision different from the one reached by my colleagues and myself in similar cases, to wit, that these are "personal or living expenses" within the meaning of section 12(1)(*h*) [at the time] of the Act and consequently are not deductible.

**13** The other precedent submitted by counsel for the Respondent is the decision of the Supreme Court of Canada in *Symes v. Canada*, [1994] 1 C.T.C. 40. *Symes* is not a case dealing with the same kind of expenses as those claimed in these particular appeals: it deals rather with child care expenses. However, it does contain a review of the notion of "personal or living expenses" as found in paragraph 18(1)(*h*) of the *Act*. Writing on behalf of the majority of the Supreme Court, Mr. Justice Iacobucci made the following statements as to how one goes about determining if an expense is a personal or living expense. The three most relevant paragraphs of his reasons are 76, 77 and 79.

**14** At page 59, Mr. Justice Iacobucci refers to this statement written by Professor Brooks:

> If a person would have incurred a particular expense even if he or she had not been working, there is a strong inference that the expense has a personal purpose. For example, it is necessary in order to earn income from a business that a business person be fed, clothed and sheltered. However, since these are expenses that a person would incur even if not working, it can be assumed they are incurred for a personal purpose - to stay alive, covered , and out of the rain. These expenses do not increase significantly when one undertakes to earn income.

At pages 59-60, Justice Iacobucci writes:

> Since I have commented upon the underlying concept of the "business need" above, it may also be helpful to discuss the factors relevant to expense classification in need-based terms. In particular, it may be helpful to resort to a "but for" test applied not to the expense but to the need which the expense meets. Would the need exist apart from the business? If a need exists even in the absence of business activity, and irrespective of whether the need was or might have been satisfied by an expenditure to a third party or by the opportunity cost of personal labour, then an expense to meet the need would traditionally be viewed as a personal expense.
>
> [Emphasis added.]

[11] It is in light of these legislative rules and precedential rulings that I will now address each of the expenditure items in dispute.

Accompaniment Expenses

[12] According to her testimony, the agent for the Minister stated that she dismissed the deduction of these expenses for two reasons. The first being that she was not convinced that the amounts in question were paid by Robin to his mother.

There was some doubt because the mother had not entered accompaniment income in the income tax returns she had produced. The second reason is that the agent for the Minister considered the expense unrelated to Robin's artistic activities.

[13] Mr. Vézina acknowledged that the four invoices for accompaniment services, which he presented in Court as Exhibit I-9, were created to justify this expense when he produced the income tax returns for his son.[1] However, these invoices reflected the existence during the relevant period of an obligation for Robin to pay his mother for accompanying him not only to his film sets, but also to numerous auditions that he had to attend. According to Mr. Vézina, his wife had the right to fees of 10% of the talent fees earned by his son, which amounted to $1,921 for 2001, $2,154 for 2002 and $3,000 for 2003.

[14] Moreover, in support of his submissions, he produced guidelines concerning child performers that were published by the Ontario Ministry of Labour in April 2007. These guidelines, which are not legal requirements, were developed by a child performer joint sub-committee, with members from the Ministry of Labour's Live Performance and Film and Television Health and Safety Advisory Committees. These guidelines recognize that child performers are special persons who need individual attention and protection. In Part III of this document, entitled "Industry Standards," it states:

> Even though the industry standards in Part III of this guideline do not fall within the scope of the Occupational Health and Safety Act, the Ministry of Labour recognises these additional industry-supported standards as part of a broader commitment to the health and safety of child performers. Workplaces within the entertainment industry are strongly encouraged to incorporate them into their workplace practices.

[15] Two passages from these guidelines are worth reproducing here; one passage concerns the presence of parents and the other pertains to psychologist services in psychologically stressful situations:

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[1] It was Mr. Vézina who signed his son's income tax returns and who, sometimes with the help of his wife, sometimes without, examined the supporting documentation to decide if he would claim the deduction. Neither his wife nor his son were present at the hearing so they could not clarify for the Court issues regarding the goods and services for which an expense deduction was requested.

> **Film, Television, and other Recorded Media**
>
> Where a child performer is less than 16-years-old, a parent should be at the location and accessible to the child performer at all times when the child performer is on set, accompany the child performer to and from the set, and accompany the child performer to hair, makeup and wardrobe.
>
> ...
>
> **Psychological Stress**
>
> When a child performer is engaged to perform subject matter that could be psychologically damaging to the child, or results in psychological stress, a psychologist or therapist who is properly accredited by the applicable ministry should be hired by the producer to guide and assist the child to handle the emotional and mental stress of such subject matter.

[16] In my opinion, an accompaniment expense is not of a personal nature when a child performer is accompanied by an adult, be it one of his or her parents or another adult. In this case, the accompaniment expense would not have been incurred if Robin had not participated in his business activities. If Robin had not had to travel to Montréal, sometimes the day before filming, to perform his work, it would have been unnecessary not only for his mother to accompany him, but also to incur transportation and living expenses in Montréal, which are expenses that the Minister has allowed. I do not see any difference between these types of expenses.

[17] Furthermore, I do not see a distinction between a well known performer who must hire a bodyguard to ensure his safety when performing and an adult accompanying a young child for the same reason. In these two cases, we can consider it an expense incurred to earn income from a business (when these performers act as independent workers). The fact that the adult in this situation is the mother of young Robin does not change the need to hire someone to ensure his safety.

[18] Concerning the question of payment, it is true that the fact that the mother did not include the amounts claimed as accompaniment fees in her income raises doubt concerning the remittance of these amounts. On the other hand, the fact that a taxpayer did not declare income does not necessarily mean that he or she did not earn it. I rely on Mr. Vézina’s testimony, which maintains that these amounts were remitted to his wife for the accompaniment of his son. It appears quite reasonable to me that Robin compensated his mother for all of her services when he was

performing. In other words, the amounts deducted appear to be quite reasonable given the circumstances. Accordingly, nothing makes them inadmissible as an expense in the calculation of Robin's income.

Clothing

[19] During his testimony, Mr. Vézina maintained that the clothing had been purchased for his son so that he could perform better at his auditions and land the roles he was pursuing. He presented a series of expenses related to the purchase of clothing that, according to him, were necessary for either the auditions or film sets. For example, he said that it could have been necessary to have clothing to keep Robin warm between different takes, since the scenes could have been filmed in inclement weather conditions. To justify that these expenses would not have been incurred had it not been for Robin's artistic activities, Mr. Vézina stated that, when his family purchased clothing, they did so in thrift stores where the prices were minimal; however, for sets or auditions, they had to buy brand new clothing, which was usually purchased at Wal-Mart, l'Aubainerie or Magasin Croteau.

[20] Firstly, I must emphasize that the documents to support the deduction of expenses incurred for Robin were not identified and classified by Mr. Vézina until several years after the purchase of the clothing. As we have seen, no income tax returns were produced for the relevant period, within the period specified by the Act. The returns were not produced until several years later and for the most part, not until the start of 2007 after I had to suspend Robin's appeal hearing to allow him to produce his supporting documentation. Under these circumstances, it is difficult to see the link between a personal appearance expense and Robin's professional activities.

[21] Secondly, during Mr. Vézina's cross-examination by counsel for the Respondent, he had to admit that some of the invoices for which he was requesting an expense deduction were expenses for women's clothing because the purchases were made in women's clothing stores.[2] This fact illustrates that it is difficult to determine what clothing was actually worn for his son's performances and to what extent years after the fact.

[22] I believe it would be opportune to reconsider the approach of courts, which have, in the past, disallowed any clothing expense by qualifying it as a personal

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[2] This fact also demonstrates that Mr. Vézina's family did not limit their shopping to thrift stores.

expense, unless the clothing is used solely for the purpose of artistic activities. I believe that a valid argument could be made in favour of the view that at least a part of the cost of clothing could constitute a relevant expense when calculating the business income of a performer, as it is in the case of expenses related to a vehicle used for both business and personal use. It is the same situation when a taxpayer has the right to deduct expenses related to the part of his or her housing that is used to carry on a business. Unfortunately, in this case, the evidence is insufficient to establish with an acceptable degree of confidence that the clothing was actually used for Robin's professional activities; the evidence is also insufficient to establish the percentage of business use compared to personal use. Among the clothing for which expense deductions were requested, there were jeans, jackets, hats, boots, mittens, toques and underwear. Since these clothes can be used in everyday life, their cost could be considered a personal expense and non-deductible.[3]

Beauty Care

[23] Among the beauty care expenses that Mr. Vézina claimed as deductions for his son, we find many that are not related to beauty care. For example, there is a receipt for $8.03 from Wal-Mart for the purchase of a calculator. Evidently, this expense could have been considered an office expense, but it would be capital outlay. On the other hand, it is another good that could be considered useful for both personal and business use. Business use is not established satisfactorily. This is the case for all or almost all of the beauty care expenses. However, an exception could be made for makeup expenses–foundation for $7.98 and blush for $4.98–expenses whose total, once increased by the GST to $14.91, could have been deductible. Regarding these expenses incurred in October 2002, Mr. Vézina indicated that his wife did not wear makeup and, accordingly, these makeup products had to have been used by his son for his professional activities.

[24] Among the beauty care expenses, there were dental surgeon and eyeglass costs, which, in my opinion, are expenses that would have been incurred regardless of Robin's artistic endeavours. Accordingly, they were personal expenses, which are not deductible. On the other hand, an exception might be made for the psychologist expense of $120, which, according to Mr. Vézina, was incurred in April 2003 because of the stress his son experienced from performing in certain

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[3] Furthermore, regarding the clothing, I must mention that they are durable goods whose cost could constitute capital outlay, of which only one part could be deducted as capital cost allowance under paragraph 20(1)(*a*) of the Act.

scenes. Under these circumstances, we can conclude that it was an expense incurred to gain or produce income from a business as it was incurred for the purpose of Robin's professional activities and would not have been incurred without these activities. The fact that medical costs could be deductible under another provision of the Act does not preclude that the expense is admissible in the calculation of business income under subsection 9(1) of the Act. It would have been necessary to use the other provision if the expense had been of a personal nature.

Office Expenses

[25] Among the office expenses, it is difficult to determine which were incurred for carrying out Robin's business and which were incurred for personal use—for example, tuition fees and school supply costs. Whether or not Robin was a child performer, he would have incurred these costs. Accordingly, these expenses fall under the category of personal expenses. For those expenses that were incurred for both business and personal use, it is not possible in this case to determine the percentage of business use.

[26] Among the office expenses, there is an expense of $79 for the purchase of skates and their sharpening in 2002. Mr. Vézina maintained that these skates were only used on set or for an audition. Accordingly, this amount can be considered an expense related to stunts, an expense that the Minister allowed. This expense of $79 should be admissible.

[27] For these reasons, the appeals of Robin Arsenault Vézina for the taxation years of 2001, 2002 and 2003 are allowed and the assessments of February 14, 2007, are referred back to the Minister for reconsideration and reassessment on the basis that Robin has the right, in the calculation of his income gained or produced from a business, to a deduction of the following amounts:

| | 2001 | 2002 | 2003 |
|---|---|---|---|
| Accompaniment | 1,921.00 | 2,154.00 | 3,000.00 |
| Skates | | 79.00 | |
| Psychologist | | | 120.00 |
| Makeup | | 14.91 | |
| Total | 1,921.00 | 2,247.91 | 3,120.00 |

The appeal for the year 2000 is dismissed, without costs.

Signed at Ottawa, Canada, this 16th day of November 2007.

"Pierre Archambault"

Archambault J.

Translation certified true
On this 18th day of December 2007.
Monica F. Chamberlain, Translator

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| CITATION: | 2007TCC655 |
| COURT FILE NO.: | 2006-1684(IT)I |
| STYLE OF CAUSE: | ROBIN ARSENAULT VÉZINA v.<br>HER MAJESTY THE QUEEN |
| PLACE OF HEARING: | Sherbrooke, Quebec |
| DATE OF HEARING: | November 29, 2006, and<br>October 9, 2007 |
| REASONS FOR JUDGMENT BY: | The Honourable Justice Pierre Archambault |
| DATE OF JUDGMENT: | November 16, 2007 |

APPEARANCES:

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| Agent for the Appellant: | Bruno Vézina |
| Counsel for the Respondent: | Marie-Claude Landry |

COUNSEL OF RECORD:

For the Appellant:

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| Name: | |
| Firm: | |

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| For the Respondent: | John H. Sims, Q.C.<br>Deputy Attorney General of Canada<br>Ottawa, Canada |