Docket: 2006-1933(IT)I

BETWEEN:

PHILIP ZEPOTOCZNY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on October 5, 2007 at Toronto, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

| | |
|---|---|
| Agent for the Appellant: | Henry Goldberg |
| Counsel for the Respondent: | Paolo Torchetti |

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## JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2003 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Edmonton, Alberta this 21st day of November, 2007.

"V.A. Miller"

V.A. Miller, J.

Citation: 2007TCC696
Date: 20071121
Docket: 2006-1933(IT)I

BETWEEN:

PHILIP ZEPOTOCZNY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

## REASONS FOR JUDGMENT

V.A. Miller, J.

[1] The Appellant, a commissioned salesman employed by Jim Peplinski's Lease Master, a division of Humberview Motors Inc. ("Lease Master"), has appealed the reassessment of his 2003 taxation year on the basis that he is entitled to deduct the following disallowed expenses:

| EXPENSE | CLAIMED | ALLOWED | DISALLOWED |
|---|---|---|---|
| | | | |
| Motor vehicle | $ 5,299.00 | $ 0 | $ 5,299.00 |
| Meals & entertainment | 3,522.00 | 861.30 | 2,660.70 |
| Accounting & legal | 1,177.00 | 1,177.00 | 0 |
| Advertising & promotion | 1,413.00 | 365.25 | 1,047.75 |
| Office expenses | 1,775.00 | 0 | 1,775.00 |
| Convention & trade shows | 1,763.00 | 0 | 1,763.00 |
| Salary to assistant | 25,720.35 | 0 | 25,720.35 |
| Telecommunications | 897.83 | 0 | 897.83 |
| Work space in the home | 737.00 | 0 | 737.00 |
| TOTAL | **$42,304.18** | **$2,403.55** | **$39,900.63** |

[2] The provisions of the *Income Tax Act* which are relevant to this appeal are as follows:

> **8. (1) Deductions allowed** -- 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:
>
> (f) **sales expenses [of commission employee]** -- where the taxpayer was employed in the year in connection with the selling of property or negotiating of contracts for the taxpayer's employer, and
>
> > (i) under the contract of employment was required to pay the taxpayer's own expenses,
> >
> > (ii) was ordinarily required to carry on the duties of the employment away from the employer's place of business,
> >
> > (iii) was remunerated in whole or part by commissions or other similar amounts fixed by reference to the volume of the sales made or the contracts negotiated, and
> >
> > (iv) was not in receipt of an allowance for travel expenses in respect of the taxation year that was, by virtue of subparagraph 6(1)(b)(v), not included in computing the taxpayer's income,
>
> amounts expended by the taxpayer in the year for the purpose of earning the income from the employment (not exceeding the commissions or other similar amounts referred to in subparagraph (iii) and received by the taxpayer in the year) to the extent that such amounts were not
>
> > (v) outlays, losses or replacements of capital or payments on account of capital, except as described in paragraph (j),
> >
> > (vi) outlays or expenses that would, by virtue of paragraph 18(1)(l), not be deductible in computing the taxpayer's income for the year if the employment were a business carried on by the taxpayer, or
> > (vii) amounts the payment of which reduced the amount that would otherwise be included in computing the taxpayer's income for the year because of paragraph 6(1)(e);
>
> **(2) General limitation** -- <u>Except as permitted by this section, no deductions shall be made in computing a taxpayer's income for a taxation year from an office or employment.</u> (emphasis added)

> **10) Certificate of employer** -- 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)

[3] According to the contract that the Appellant signed with Lease Master, in 2003 the Appellant received a company car; a $100 monthly allowance for gasoline; reimbursement for any additional business travel expenses that had been pre-approved; and a $50 monthly allowance for a celluar telephone. The Appellant had to submit receipts with his claim for these expenses. As well, the Appellant requested and received a “Promotion and Advertising Budget” in the amount of $5,450.

[4] The Appellant’s T-4 for 2003 included an automobile benefit in the amount of $3,933.12. The Appellant filed a form T2200 dated March 12, 2004 with his income tax return for the 2003 taxation year. In the form the Appellant’s employer indicated that the Appellant:

a) had to pay his own expenses;

b) was required to work away from his place of business;

c) received an allowance of $1,800;

d) received a repayment of the expenses he paid to earn employment income;

e) was required to pay for gas, phone, entertainment and stationery beyond the amount allowed in his contract;

f) was not required to use a portion of his home as an office;

g) was not required to pay for an assistant;

h) was not required to pay for supplies that he used directly in his work; and

i) would not be repaid for any of the expenses he incurred in paragraphs f, g and h.

[5] The Appellant was issued a Notice of Reassessment dated October 3, 2005 wherein he was advised that the Minister of National Revenue (the "Minister") had reassessed his 2003 income tax liability to disallow expenses claimed in the amount of $39,900.63. On October 11, 2005, the Appellant sent the Minister a new T2200 for the 2003 taxation year. According to this new form the Appellant was required to use a portion of his home as an office, to pay for an assistant and to pay for supplies that he used directly in his work.

[6] Clearly the two forms conflict and the issue becomes whether I accept the second form as representing the true state of affairs. I am mindful of Chief Justice Bowman's comments on credibility in the decision of *Faulkner* v. *M.N.R.*, 2006 TCC 239 where he stated the following:

> [13] Where questions of credibility are concerned, I think it is important that judges not be too quick on the draw. In *1084767 Ontario Inc. (c.o.b. Celluland) v. Canada*, [2002] T.C.J. No. 227 (QL), I said this:
>
> > 8 The evidence of the two witnesses is diametrically opposed. I reserved judgment because I do not think findings of credibility should be made lightly or, generally speaking, given in oral judgments from the bench. The power and obligation that a trial judge has to assess credibility is one of the heaviest responsibilities that a judge has. It is a responsibility that should be exercised with care and reflection because an adverse finding of credibility implies that someone is lying under oath. It is a power that should not be misused as an excuse for expeditiously getting rid of a case. The responsibility that rests on a trial judge to exercise extreme care in making findings of credibility is particularly onerous when one considers that a finding of credibility is virtually unappealable.
>
> [14] I continue to be of the view that as judges we owe it to the people who appear before us to be careful about findings of credibility and not be too ready to shoot from the hip. Studies that I have seen indicate that judges are no better than any one else at accurately making findings of credibility. We do not have a corner on the sort of perceptiveness and acuity that makes us better than other people who have been tested such as psychologists, psychiatrists or lay people. Since it is part of our job to make findings of credibility, we should at least approach the task with a measure of humility and recognition of our own fallibility. I know that appellate courts state that they should show deference to findings of fact by trial judges because they have had the opportunity to observe the demeanour of the witness in the box. Well, I have seen some accomplished liars who will look you straight in the eye and come out with the most blatant falsehoods in a confident, forthright and frank way, whereas there are honest witnesses who will avoid eye contact, stammer, hesitate, contradict themselves and end up with their evidence in a complete shambles. Yet some judges

> seem to believe that they can instantly distinguish truth from falsehood and rap out a judgment from the bench based on credibility. The simple fact of the matter is that judges, faced with conflicting testimony, probably have no better than a 50/50 chance of getting it right and probably less than that when their finding is based on no more than a visceral reaction to a witness. Moreover, it is essential that if an adverse finding of credibility is made the reasons for it be articulated

[7] I have given absolutely no weight to the second form T2200 submitted by the Appellant. My reasons are as follows:

(a) The form was only prepared after the Appellant had been reassessed and the expenses were disallowed. As such the motive for preparing the second form is suspect.

(b) The Appellant stated that Peter Opar who signed both forms had been mistaken when he filled out the initial form. Yet the Appellant did not call Peter Opar as a witness.

(c) The Appellant stated that he has two sons and in 2003 neither son had a job. He created a job as his assistant for his son, Tyler. He stated that he did this without going to management and this was the reason Peter Opar filled out the first form as he did. These statements are totally implausible as the documentary evidence disclosed that throughout 2003 Tyler Zepotoczny was an employee of Lease Master on a full-time basis. According to the T4 issued by Lease Master to Tyler Zepotoczny, his salary in 2003 was $38,306.10.

(d) The Appellant had an assistant who was employed by Lease Master. The Appellant stated that his assistant's first name was Belinda.

[8] As a result, in accordance with subsection 8(10) of the *Act* and the T2200 that the Appellant filed with his income tax return, the Appellant is not entitled to deduct expenses related to office supplies, work space in the home and salary to an assistant.

[9] The Appellant was provided a company car and was given a monthly allowance of $100 for the cost of gasoline. It is noted that according to his contract, the Appellant had to submit receipts to his employer in order to obtain the gasoline allowance. The Appellant said he was not fully reimbursed for his gasoline expenses; however, he gave no receipts and no evidence as to the amount he spent for gasoline that was not reimbursed. It was also the Appellant's evidence that he paid for the insurance on the company car. However, he did not have any documents to support

his statement. The Appellant's contract stated that the insurance on the company car would be paid in accordance with the "Demo Policy". I infer from this that if the Appellant had to pay for the insurance he could very easily have tendered the "Demo Policy" as an exhibit.

[10] The Appellant claimed meals and entertainment expenses in the amount of $3,522.00. His claim was allowed for the amount of $1,722.57. Only 50% of the $1,722.57 is deductible in accordance with subsection 67.1(1) of the *Act*. The Appellant did not tender any documents at trial to support the balance of his claim in the amount of $1,799.43. The Respondent tendered some of the receipts that the Appellant had given to the Canada Revenue Agency ("CRA"). The receipts showed that the Appellant had claimed the same expense twice (the restaurant receipt and the credit card statement); the cost of a staff birthday party; the cost of a luncheon for the Information Technology Section of his office; the cost of his personal lunch and costs of meals delivered to his home. These receipts did not total $1,799.43 and the expenses submitted were not incurred to earn employment income.

[11] The Appellant claimed the cost of purchases from the Liquor Control Board of Ontario ("LCBO"). These purchases were not explained by the Appellant and the Reply to the Notice of Appeal lists some of the purchases as relating to team building, an open house at the Appellant's residence and beer for the son's birthday party. I have already noted that the Appellant received a Promotion and Advertising Budget in the amount of $5,450 from Lease Master. Consequently, I find that the amount of $1,047.75 was not incurred to earn employment income.

[12] The Appellant's evidence confirmed the assumptions in paragraph 6(u) to (z) of the Reply to Notice of Appeal which were that the expenses in the amount of $1,763 claimed by the Appellant were for additional costs incurred while he and his wife were on a cruise that was paid for by his employer. The expenses claimed included the cost of a limousine to and from his home and the airport, credit card expenses while on the ship for gifts, drinks, taxis to and from the ship and the beach, tips and souvenirs for his son and his assistant. These expenses were not incurred to earn employment income.

[13] The Appellant was given a monthly allowance of $50 to pay for his telecommunications expenses. He stated that he incurred more than the $600 allowance and yet when asked for the telephone bills to support his statement, the Appellant tendered the bills belonging to his son, Tyler Zepotoczny who also worked at Lease Master National.

[14] The Appellant was totally unprepared for the hearing of his appeal. He presented no relevant documents to support his appeal and much of his testimony was contradicted by documentary evidence presented by the Respondent. In a situation such as this where I have found that there were a series of excessive or implausible claims made by the Appellant, there is a shadow cast on all of the Appellant's evidence (*Chrabalowski* v. *Canada*, [2004] T.C.J. No. 488).

[15] I have reviewed all of the evidence and I find that the Appellant has not demonstrated that the Minister was in error in disallowing the claimed deductions.

[16] The appeal is dismissed.

Signed at Edmonton, Alberta this 21st day of November, 2007.

"V.A. Miller"

V.A. Miller, J.

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|---|---|
| CITATION: | 2007TCC696 |
| COURT FILE NO.: | 2006-1933(IT)I |
| STYLE OF CAUSE: | Philip Zepotoczny v. The Queen |
| PLACE OF HEARING: | Toronto, Ontario |
| DATE OF HEARING: | October 5, 2007 |
| REASONS FOR JUDGMENT BY: | The Honourable Justice Valerie Miller |
| DATE OF JUDGMENT: | November 21, 2007 |

APPEARANCES:

| | |
|---|---|
| Agent for the Appellant: | Henry Goldberg |
| Counsel for the Respondent: | Paolo Torchetti |

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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