

Docket: 2008-1079(IT)I

BETWEEN:

NICOLE LOGAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on September 22, 2008, at Fredericton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

Representative of the Appellant: Derek R. Logan

Counsel for the Respondent: Kendrick Douglas

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* in respect of the 2004 and 2005 taxation years are dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 15th day of October 2008.

« François Angers »

Angers J.

Citation: 2008 TCC 546
Date: 20081015
Docket: 2008-1079(IT)I

BETWEEN:

NICOLE LOGAN,

Appellant,

and

HER MAJESTY THE QUEEN,

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REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal from assessments for the appellant's 2004 and 2005 taxation years. At all material times, the appellant worked full-time as an employee of the Canada Post Corporation (the "employer") as a rural and suburban mail carrier. Her duties consisted of delivering mail, changing kiosk locks and making "to-the-door" deliveries to rural and suburban homes.

[2] In 2004, the appellant received a per-kilometre driving allowance from her employer of 42 cents for the first 5,000 kilometres in that year and 36 cents for any additional kilometres driven. In 2005, she received from her employer, for the first eight months, 42 cents for the first 5,000 kilometres and 36 cents for any additional kilometres, and for the remainder of that year, 45 cents for the first 5,000 kilometres and 39 cents for any additional kilometres.

[3] The appellant thus received from her employer a reimbursement of \$5,287.60 for 13,854 kilometres in 2004 and \$5,406.93 for 14,186 kilometres in 2005.

[4] The appellant did not include those amounts in calculating her income for the two taxation years in question. She instead claimed automobile expenses for fuel, repairs, insurance, licence, interest and capital cost allowance; these totalled \$12,683.34 for the 2004 taxation year and \$10,592.05 for the 2005 taxation year. The

appellant subtracted the non-taxable amount she received from her employer for each taxation year and claimed the difference as employment expenses.

[5] The appellant used a 2002 Dodge Caravan vehicle to deliver the mail for both taxation years and the issue raised at trial centred around the cost of fuel to run the Caravan, the kilometres travelled in a year and the average consumption of gasoline per 100 kilometres for that type of vehicle, and whether it was city or highway driving.

[6] Many calculations became necessary at the audit level because the actual kilometres driven on the appellant's daily route had not been provided to the auditor and the appellant did not keep track of her driving for personal purposes.

[7] The evidence is now that the appellant travels exactly 55.7 kilometres a day on her route or 278.5 kilometres a week. She has two weeks' vacation and 11 statutory holidays. She thus works a total of 48 weeks a year, which, multiplied by 278.5, gives a total of 13,368 kilometres a year. That number is consistent with the kilometres claimed by the appellant and paid for by her employer as referred to above, namely, 13,854 kilometres in 2004 and 14,186 in 2005. I am not deducting any kilometres for travel from home to work and back or for any other contingency such as snowstorms.

[8] The evidence also discloses that the appellant used the vehicle for personal purposes, and she testified that such use constituted approximately 10% of all her driving. She did not keep a logbook and was therefore unable to establish the actual number of kilometres she travelled in a year or indicate what the odometer reading might have been for the vehicle.

[9] The fuel cost claimed for 2004 is \$ 5,089.32 and \$ 4,669.03 is claimed for 2005. According to the appellant, these costs were all incurred to perform her duties.

[10] At the audit level, calculations were made to determine the actual kilometres driven in a year based on the fuel costs claimed, the type of vehicle, the average price of fuel in each taxation year and the fuel consumption guide. It was assumed that half of the route was highway driving at a consumption rate of nine litres per 100 kilometres and that the other half was city driving at a consumption rate of 13.4 litres per 100 kilometres. At an average fuel cost per litre of 93 cents and \$1 for the 2004 and 2005 taxation years respectively, the vehicle would have been driven 47,000 kilometres for both business and personal purposes in 2004 and 41,000 kilometres in 2005.

[11] These calculations also enabled the auditor to conclude that 29% of the vehicle's usage in 2004 was in the performance of the appellant's duties and that the figure was 35% in 2005. As a result, the total motor vehicle expenses came to \$ 3,678 for 2004 and 3,647 \$ for 2005, and thus the amount paid by the employer was in excess of the actual cost of maintaining and operating the vehicle for the performance of the appellant's duties.

[12] In doing her calculations, the auditor took into account what are called idling costs because of the particular use to which the vehicle was being put. The evidence reveals that the vehicle was not being operated under normal conditions in that it was subjected to many "stop and gos", there was idling time and different weights were carried depending on the volume of mail being delivered.

[13] 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).

[14] The issue is whether the appellant is entitled to deduct employment expenses with respect to the use of her vehicle in carrying out her duties. The difficulty that arises in this case is that the appellant has in fact received an allowance from her employer for her motor vehicle expenses that was, because of paragraph 6(1)(b) of the *Income Tax Act*, not included in computing her income for either taxation year at issue, and thus the appellant falls within the exception in subparagraph 8(1)(h.1)(iii) such that she is precluded from deducting the expenses claimed.

[15] Subparagraph 8(1)(h.1)(iii) has been interpreted as meaning that the exception set out therein relates only to travel expenses for which the allowance was paid and is not a bar to a claim for travel expenses for which it was not paid (see *Evans v. The Queen*, 99 DTC 168, at paragraph 25). In that decision, at paragraph 27, Judge Porter referred to the following excerpt from a decision of Jerome A.C.J.:

. . . 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).

[16] Former Chief Justice Bowman, in *Henry v. The Queen*, 2007 DTC 1410, at paragraph 10, summed the matter up in the following terms ,:

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.

[17] In these appeals, the appellant was reimbursed for her motor vehicle expenses by her employer on the basis of the exact number of kilometres travelled by her to perform her duties and at the per-kilometre rate referred to above. It is therefore fair to say that the expenses for every kilometre travelled and claimed were fully

reimbursed by her employer and that there are no expenses relating to travel for which she was not paid. This would put the appellant within the exception set out for in subparagraph 8(1)(h.1)(iii) of the *Act*.

[18] The second issue is whether the amounts reimbursed are unreasonably low in the circumstances. In order to make a determination on this point, the auditor went through a series of calculations and established that the allowance paid was reasonable in relation to the expenses claimed. The appellant disagrees and maintains that the allowance was unreasonable.

[19] The appellant did not keep a logbook of her kilometres travelled and is therefore unable to establish with any degree of reliability how many kilometres she travelled in the vehicle in a year or the actual number of kilometres travelled for personal purposes. The appellant simply stated that she used the vehicle about 10% of the time for personal purposes and that all the fuel purchases claimed were for the mail delivery.

[20] The allowance for motor vehicle expenses received by the appellant was \$5,287.60 for 13,854 kilometres in 2004 and \$5,406.93 for 14,186 kilometres in 2005. The evidence discloses that the vehicle used in both taxation years consumes 13.4 litres per 100 kilometres for city driving and 9 litres per 100 kilometres for highway driving. The auditor assumed a fifty-fifty split between city and highway driving. The appellant disputed that, saying that highway travel is seldom done on her route.

[21] The price of a litre of gas in 2004 was on average 93 cents, and it was \$1 in 2005. These prices were not disputed by the appellant. What she did argue, however, was that her use of the vehicle was not normal use and that therefore the average consumption of gas per 100 kilometres as determined by the auditor is wrong.

[22] There was no evidence presented by the appellant that can assist the Court in determining what might be an appropriate fuel consumption figure for this type of abnormal driving. The burden of proof rests on the appellant to establish the unreasonableness of the allowance she received. To simply say that the allowance was not sufficient and that the auditor failed to consider certain aspects of the issue is not enough to meet that burden.

[23] Given that the appellant's vehicle was used in abnormal conditions and as she testified that she spent \$20 on fuel every day for both personal and business use of the vehicle at an average price per litre for both taxation years of 96.5 cents, I took

the fuel cost for city driving at a consumption rate of 13.5 litres per 100 kilometres and multiplied by the approximate number of kilometres travelled by the appellant for mail deliveries in 2004, which gave a total fuel cost of \$1,797.80. The appellant claimed \$5,089 for fuel for 2004, leaving \$ 3,292 as the cost of fuel for personal use of the vehicle; this translates into a total of approximately 25,360 kilometres travelled for personal purposes. She would therefore have used the vehicle for personal purposes more than half the time. After reducing her other vehicle expenses by approximately 55% to allow for personal use, I arrived at a total of \$3,403 to which I added the cost of fuel of \$1,797.80; this gave a total of \$5,200.80, which is about \$200 lower than the allowance paid. I am fully conscious of the fact that these are approximate numbers, but they are sufficient for me to conclude that the allowance was reasonable for both taxation years. I have factored in the cost of commercial insurance coverage in doing these calculations. If I were to conclude that the entire amount of the fuel cost claimed was spent on delivering mail, it would mean that the vehicle consumed 40.7 litres per 100 kilometres, which, for this type of vehicle, is highly unlikely.

[24] The appellant has not been able to establish on a balance of probabilities that the allowance was unreasonable. The appeals are therefore dismissed.

Signed at Ottawa, Canada, this 15th day of October 2008.

« François Angers »

Angers J.

CITATION: 2008 TCC 546
COURT FILE NO.: 2008-1079(IT)I
STYLE OF CAUSE: Nicole Logan and Her Majesty The Queen
PLACE OF HEARING: Fredericton, New Brunswick
DATE OF HEARING: September 22, 2008
REASONS FOR JUDGMENT BY: The Honourable Justice François Angers
DATE OF JUDGMENT: October 15, 2008

APPEARANCES:

Representative of the Appellant: Derek R. Logan
Counsel for the Respondent: Douglas Kendrick

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