Docket: 2008-782(IT)G

BETWEEN:

JACQUES BILODEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on May 11, 2009, at Sherbrooke, Quebec.
Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant: Richard Généreux

Counsel for the Respondent: Alain Gareau

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 2003 and 2004 taxation years are allowed, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to eligible meal expenses in the amount of $4,000 for 2003 and $3,125 for 2004. In all other respects, the assessments under appeal remain unchanged, in accordance with the attached Reasons for Judgment.

Each party shall bear their own costs.

Signed at Ottawa, Canada, this 19th day of June 2009.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 27th day of July 2009.

François Brunet, Revisor

Citation: 2009 TCC 315
Date: 20090619
Docket: 2008-782(IT)G

BETWEEN:

JACQUES BILODEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Lamarre J.

[1] This is an appeal from the assessments made by the Minister of National Revenue ("**Minister**") under the *Income Tax Act* ("**ITA**") for the 2003 and 2004 taxation years. By these assessments, the Minister disallowed the amount of $43,115 which the Appellant claimed as a deduction, against his commission income, as "returns, allowances, and discounts" for 2003. The Minister disallowed the deduction because the amount in question was a taxable commission received by the Appellant on two life insurance polices that he had personally taken out. It is that amount that is in issue in this case.

[2] The Minister also disallowed certain expenses. Except for meal-related expenses, the Appellant is no longer challenging the disallowance of the expenses. With respect to the meal expenses, at the beginning of the hearing, the Respondent conceded, and the Appellant agrees, that the total amount of meal expenses resulting in a deduction was $8,000 in 2003 and $6,250 in 2004, of which only 50% is deductible. The Minister therefore conceded that the eligible meal expenses are $4,000 for 2003 and $3,125 for 2004, in accordance with section 67.1 of the ITA. The Appellant was also assessed late-filing penalties, in accordance with subsections 162(1) and 162(2) of the ITA. He only challenges the penalties assessed under subsection 162(2).

[3] I will now come back to the issue in this case, that is, the amount of $43,115 in commissions received by the Appellant in 2003. The Appellant is a life insurance broker and he earns his income from commissions from companies for which he sells life insurance policies. He is a consultant for Force Financière Excel ("**Excel**"), which plays the role of intermediary between the insurance company and the consultant. The Appellant is entitled to a base salary of 65 per cent of client premiums over the course of the first year on an insurance policy. To that is added an additional commission of 135 per cent of the base salary, which the Appellant receives because he is on the list of best salespersons. The additional commission was negotiated between the Appellant and Excel. It is the insurance company for which the insurance policy is sold that pays the Appellant's full salary, upon the instruction of Excel.

[4] In 2003, the Appellant personally took out two insurance policies from the insurance company Transamerica Vie, one under which he was the insured person and his wife, Mireille Fortier, the beneficiary (**Policy 750**) (Exhibit I-2), and the other under which his wife was the insured person and he the beneficiary (**Policy 751**) (Exhibit I-3). The insured principal for each of the two policies was $1,000,000. In both cases, the policies were universal life insurance with guaranteed insurance costs. In the insurance jargon, this means that the person who invests in such a policy invests a greater amount in the beginning that is deposited into a fund where earnings grow tax-free and are used to pay insurance costs over an average period of about 5 to 7 years, based on the rate of return in the fund. The initial amount invested must not exceed a certain threshold for the yield to remain non-taxable.[1] Conversely, a term life insurance by age group is a policy whereby a fixed annual premium is paid for a predetermined number of years, usually 10 or 20 years. It is this latter type of insurance, term life insurance, that individuals generally purchase when they want to purchase life insurance protection.

[5] As for the universal policies taken out by the Appellant, he paid premiums of $18,999.96 during the first two years, for a total of $37,999.92 on the policy for which he was the insured person (Policy 750) (Exhibits A-7 and A-8). For the policy for which his wife was the insured person (Policy 751), he paid premiums of $9,999.96 for the first year and of $9,166.63 for the second year, for a total of $19,166.59 (Exhibits A-4 and A-5).

[1] Counsel for the parties both mentioned that this tax treatment was possible for the purposes of subsection 138(12) of the ITA, without however emphasizing how exactly tax exemption is calculated. Also, I will not go into further detail on the possibility of earning tax-sheltered interest in an insurance fund.

[6] On Policy 750, the total net value of the fund (after deductions for insurance costs) as of October 9, 2004, that is, after the first year, was $14,268.11 (Exhibit A-8) and after the second year, was $29,183.09 as of October 9, 2005 (Exhibit A-7). The surrender charges as of October 10, 2004, were $48,000 (Exhibit A-8, page 3 of 6) and as of October 10, 2005, were $64,000 (Exhibit A-7, page 4 of 7). Therefore, the surrender charges greatly exceeded the net value of the accumulated fund over the course of the first two years, which indicated that the policy had no surrender value. As of April 30, 2009 (therefore in the sixth year), the cumulative value of the fund was $3,388.62 and the surrender charges were $64,000 (Exhibit A-6, second page).

[7] Similarly, for Policy 751, the total net value of the fund as of October 9, 2004, was $8,002.96 and the surrender charges as of the same date were $38,000 (Exhibit A-5, pages 2 and 3 of 6). The value of the fund over the course of the second year, that is, as of October 9, 2005, was $16,506.58 and the surrender charges were $50,000 (Exhibit A-4, pages 3 and 4 of 7). As of April 30, 2009 (in the sixth year), the cumulative value of the fund rose to $10,736.21 and the surrender charges were $50,000 (Exhibit A-6, first page). Therefore, it can be seen that, after a period of six years, there was no surrender value on the two policies. Thus, the Appellant submitted that he did not take out these two policies for investment purposes, but rather to secure the protection of personal life insurance, even though the insurance premiums paid themselves directly out of the insurance fund over a period of 6 and 7 years, without the Appellant having to contribute more after the initial period of two years.

[8] The Appellant however stated that if he had not been a life insurance broker, he probably would not have purchased this type of insurance. Indeed, the investment of the first two years is too high to take out a universal life insurance policy. It is much more affordable to take out term life insurance where the premiums are paid annually over a period of 10 or 20 years. The Appellant acknowledged that it is the receipt of a commission that he considered non-taxable, as of the first year, which allowed him to absorb the elevated cost of the universal insurance. Indeed, according to the calculations made by the Appellant, he contributed a total of $57,166.51 over the course of 2003 and 2004 to acquire these two policies. In return, he received a commission of $43,115. The net cost of his life insurance on the two policies, that is, $14,051.51, is the difference owed to him, provided of course that the commission is not taxable. Moreover, by choosing to invest in a universal life insurance policy, the Appellant had to pay his premiums over the course of the first two years, failing which he would have had to reimburse a significant portion of his commission (Exhibit A-3).

[9] Bertrand Fortier, V.P. Finance for Excel, confirmed that universal policies such as those taken out by the Appellant, cannot have any surrender value until all costs (commissions, surrender and issuance costs) are reimbursed from the fund. Generally speaking, such a policy acquires surrender value after a period of 10 years. Then, the surrender value corresponds to the premiums paid less the net cost of insurance. In addition, the premiums invested in the beginning by the person who acquires this kind of policy are spread over the first two years. Then, in theory, the holder of such a policy can benefit from the life insurance attached to the policy for an average period of five years, without having to invest additional premiums. In the case of the Appellant and his wife, the policy on which the Appellant is the insured person expires this year, unless he decides to pay annual premiums in the future to keep his life insurance, which the Appellant said he does not want to do because it would not be to his advantage. His policy, which was taken out in 2003, will have therefore been in effect for a period of six years. As for the policy where his wife is the insured person, the fund still has enough money for another year, which means that her life insurance policy will have been in effect for a period of seven years.

[10] In completing the Appellant's income tax returns, Mr. Fortier included the amount of the commission in the amount of $43,115 that the Appellant received from Transamerica Vie for the two life insurance policies. He however deducted that same amount, thus treating that amount as an insurance rebate. It appears that in the insurance industry, commissions received upon purchasing personal life insurance policies are considered to be tax-exempt. This policy is based on Interpretation Bulletin IT-470R, issued by the Canada Revenue Agency ("**CRA**") dated April 8, 1988, as amended on August 11, 1999. This Bulletin, which describes employees' fringe benefits, is also relevant to taxpayers who have their own businesses, to self-employed workers (see tax decision, document no. 2000-0017597 (F) of July 31, 2000, (Exhibit I-12)). The relevant passages from Interpretation Bulletin IT-470R (Exhibit I-11) read as follows:

> **GovCan Publications --- Interpretation Bulletin IT-470R – Employees' Fringe Benefits (Consolidated)**
>
> . . .
>
> **Summary**
>
> This bulletin discusses various common types of "fringe benefits" and indicates whether or not their values should be included in income. Part A of the bulletin deals with amounts to be included in income while Part B deals with amounts not to be included in income.

Discussion and interpretation

Introduction

1. The information herein refers to cases where there is an employee-employer relationship but does not necessarily apply if the employee is also a shareholder or relative of the owner of the business.

2. Except where the Act provides otherwise, taxpayers are generally taxable on the value of all benefits they receive by virtue of their employment. The more common "fringe benefits" are discussed below and have been classified generally as taxable benefits or as non-taxable privileges. In the second group there may well be a point beyond which the "privilege" concept is no longer valid, i.e., the advantage to the employee is, in fact, a form of extra remuneration. Then the "fringe benefit" is viewed as a taxable benefit.

3. Where an amount in respect of a taxable benefit should be included in income, the employer must determine its value or make a reasonable estimate of it and include that value in the box provided on form T4 Supplementary under the heading "Employment Income Before Deductions" and also in the appropriate box in the area entitled "Taxable Allowances and Benefits".

. . .

Part B – Amounts not to be included in income

Discounts on Merchandise and Commissions on Sales

27. Where it is the practice of an employer to sell merchandise to employees at a discount, the benefits that an employee may derive from exercising such a privilege are not normally regarded as taxable benefits. However, this does not extend to an extraordinary arrangement with a particular employee or a select group of employees nor to an arrangement by which an employee is permitted to purchase merchandise (other than old or soiled merchandise) for less than the employer's cost. Furthermore, this treatment does not extend to a reciprocal arrangement between two or more employers whereby the employees of one can exercise such a privilege with another by whom the employees are not employed. A commission received by a sales employee on merchandise acquired for that employee's personal use is not taxable. Similarly, where a life insurance salesperson acquires a life insurance policy, a commission received by that salesperson on that policy is not taxable provided the salesperson owns that policy and is obligated to make the required premium payments thereon.

[Emphasis added.]

[11] In her Report on Objection (Exhibit A-9), the appeals officer, Nathalie Lemieux, mentioned that the decision of the auditor (deceased at the time of the objection) to refuse to reduce the commission income in the amount of $43,115 for returns, allowances, and discounts was made on the grounds that the life insurance policies were not purchased by the Appellant with a view to obtaining personal protection but for investment purposes.

[12] Ms. Lemieux made the following remarks in her report: (Exhibit A-9, at pages 2 and 3 of 5)

[TRANSLATION]

> . . .
>
> According to the auditor's report, that deduction was disallowed because the life insurance policies were not purchased with a view to obtaining personal protection but for investment purposes. Therefore, the commission received is taxable (see "Conference for Advanced Life Underwriting" of May 2000 and the "tax decision").
>
> According to Document No. 2004-006699117, the premiums paid by the policyowner are used by the company for investment purposes. The investment acquires a surrender value which allows the owner to obtain advances on the surrender value of the policy.
>
> According to IT-470R, "Employees' Fringe Benefits," where a life insurance salesperson acquires a life insurance policy, a commission received by that salesperson on that policy is not taxable provided that the salesperson owns that policy and is obligated to make the required premium payments thereon. In that case, Mr. Bilodeau owns the policy in question and he paid premiums in that respect. At first blush, the commissions should not be taxable but that is not the case. The following point was made in Opinion 2000-017597 in that regard:
>
> [TRANSLATION]
>
> "Thus, although all commissions received are generally taxable, the position of the Agency is that where a life insurance salesperson purchases a life insurance policy for personal purposes, the commission received from the employer is not taxable. In addition, the Agency applies that position to self-employed workers.
>
> During the "Conference for Advanced Life Underwriting" held in May, the Agency issued some clarifications regarding its position set out in paragraph 27 of IT-470R. Particularly, it stated that the discussion in the Bulletin did not involve commissions received on the purchase of any type of life insurance policy. The Agency also specified that, where an insurance salesperson purchases a life insurance policy for investment or business purposes, the commission received is taxable.

> The phrase "life insurance policy" used in Interpretation Bulletin IT-470R was never intended to be used in the same sense as in subsection 138(12) of the Act. In fact, it was aimed specifically at life insurance policies acquired for the purpose of obtaining personal protection.
>
> Therefore, commissions received by a life insurance salesperson following the acquisition of an annuity contract or a segregated fund policy as an investment are taxable for the salesperson."
>
> As I had copies of the client's life insurance policies, I noted that he opted for the "Wealth Advantage" plan. I therefore looked it up on the Internet. According to the information I obtained, that universal life insurance policy involves an element of investment. In addition, by accumulating funds in the universal life insurance policy, a client may decide how to invest the premium and may make cash withdrawals. The "Wealth Advantage" plan combines long-term, tax-deferred investment growth with the immediate financial protection of comprehensive life insurance. This product is tailored to suit the needs of individuals who seek a wide range of interest options, a bonus tied to investment performance and more.

[13] Counsel for the Appellant relies primarily on Interpretation Bulletin IT-470R to argue that the Respondent incorrectly disallowed the deduction in the amount of $43,115. He submits that the two policies cannot be used as an investment attraction tool or become redeemable until their eleventh year of existence. He submits that the policies were therefore not acquired for investment purposes but rather merely for the purpose of obtaining personal life insurance protection. In this context, the provisions of the Interpretation Bulletin should be applied to render non-taxable the commission the Appellant received when he acquired his two life insurance policies.

[14] In my view, the commission received in the amount of $43,115 is taxable income within the meaning of subsection 9(1) of the ITA. It is income that the Appellant earned from his business. Indeed, the Appellant received that amount in carrying out his profession of life insurance broker. Had he not been a broker, he would not have received that commission. He himself explained that the advantage for him in acquiring two universal life insurance policies was the fact that he was a broker, as this allowed him to receive a commission that considerably reduced the cost of the premiums associated with this type of life insurance policy. That the two policies were acquired by him for personal purposes, as he submits, does not change the fact that he earned the commission in issue as part of his professional activities as a broker. It is precisely because he was a professional broker that he was entitled to that commission.

[15] As for Interpretation Bulletin IT-470R, it is not a substitute for the ITA. The bulletin only reflects the opinion of the Minister, and does not bind either the Minister, the taxpayer or the courts. It is also true, however, that Interpretation Bulletins are an important tool to interpret the ITA if there is a doubt as to the meaning there of (see *Vaillancourt v. Deputy Minister of National Revenue*, 1991 CarswellNat 795 at paragraph 21, [1991] 3 F.C. 663).

[16] In the present case, there is no doubt in my mind that the commission received by the Appellant was income earned from his profession, and taxable within the meaning of subsection 9(1) of the ITA.

[17] Interpretation Bulletin IT-470R extends the treatment reserved in some cases by the CRA to a certain category of taxpayers under certain circumstances. Despite the fact that a commission received on a sale is by its very nature taxable, the CRA views some of these commissions as a privilege for the seller who receives it. Thus, just as an employer may sell merchandise to employees at a discount, so can an insurance company offer a discount to its sellers if they acquire a personal life insurance policy from it, according to the CRA. In such cases, the CRA views the discount as a privilege related to employment or profession, and agrees to treat the benefits as non-taxable. However, this only reflects the administrative policy of the CRA that, to my knowledge, cannot be in any way derived from the ITA. Indeed, there is nothing in the provisions of the ITA exempting from taxation this type of privilege.

[18] Thus, in my view, unless the CRA changes its administrative policy, or considers that a particular case does not meet the conditions required to appeal to the generous nature of taxation authorities, the taxpayer cannot invite this Court to compel the CRA to comply with its Interpretation Bulletin, especially if the bulletin grants a tax break that is inconsistent with tax legislation. The taxpayer could perhaps have a remedy in damages in a court of original jurisdiction, against the federal government, but that remedy does not avail before the Tax Court of Canada, whose mandate is to determine whether an assessment is valid within the meaning of the ITA. That being said, I note that in paragraph 2 of Bulletin IT-470R, the CRA specifies that where the advantage to the employee is, in fact, a form of extra remuneration, said benefit remains taxable.

[19] Accordingly, whether the policies were acquired by the Appellant for personal reasons, or to obtain a tax-free return on his investment, does not in any way change, in my view, the fact that the commission he received in carrying out his profession is taxable.

[20] Alternatively, counsel for the Appellant argued that if the commission was taxable, the premiums the Appellant paid to acquire the two policies should be deductible. He submitted that the premiums were paid at least in part, to withdraw his taxable commission income. He relied on, among other things, the fact that if the Appellant had not paid those premiums over the course of the first two years, he would not have been entitled to his commission.

[21] I disagree with the Appellant's submission. The Appellant paid premiums to purchase the two life insurance policies specifically to obtain protection on his life and on that of his wife for personal purposes. If one spouse dies, the other will be entitled to insurance proceeds of $1,000,000 immediately after the death. It is true that by paying the premiums over a period of two years the Appellant was sure to receive a commission. However, the purpose was not to generate taxable net earnings, but rather to substantially reduce the cost of insurance of the two policies acquired for personal purposes.

[22] This is evident in the amount of the premiums paid, which greatly exceeds the amount of the commission received for the two policies. In determining whether an expense was made for the purpose of gaining or producing income from the business or property, so that a deduction in respect of that expense may be made in accordance with paragraph 18(1)(*a*) of the ITA, it is necessary to take into account the purpose of the expense, from a practical and business point of view. I refer, among other things, to *Symes v. Canada*, 1993 CarswellNat 1387, [1993] 4 S.C.R. 695. In analyzing paragraph 18(1)(*a*) of the ITA, Iacobucci J. stated as follows at paragraphs 66 and 67:

> 66 . . . it is nonetheless true that the current wording of s. 18(1)(*a*) is sufficient justification for the view that Parliament acted to amend its predecessor section in such a way as to broaden the scope for business expense deductibility. Professor Brooks adopts this view, and suggests that the only true question under s. 18(1)(*a*) is: "was the expense incurred for a personal or business purpose?" (*supra*, at p. 253). Other commentators propose other tests which vary in the extent to which they borrow directly from the language of s. 18(1)(*a*). Examples include a "predominant purpose" test (C. F. L. Young, "Case Comment on *Symes v. The Queen*", [1991] Brit. Tax Rev. 105, at p. 105), or, more basically, a test which requires simply an income earning purpose: Krishna, *The Fundamentals of Canadian Income Tax*, *supra*, at pp. 365-66; E. C. Harris, *Canadian Income Taxation* (4th ed. 1986), at pp. 191-92.
>
> 67 All of these tests include some reference to the purpose of an expense. In considering the extent to which a purpose test is appropriate, I wish to make note of the decision of Wilson J. in *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*,

[1988] 2 S.C.R. 175. Therein, Wilson J. considered a taxation provision substantially similar to s. 18(1)(*a*), she examined jurisprudence on s. 18(1)(*a*), and she came to the following conclusion (at p. 189):

> The only thing that matters is that the expenditures were a legitimate expense made in the ordinary course of business with the intention that the company could generate a taxable income some time in the future.

[23] Heureux-Dubé J. expressed the same opinion at paragraphs 191 and 192:

> 191 Pursuant to s. 9(1) of the Act, reproduced earlier, a taxpayer's income for a taxation year from a business is the taxpayer's profit therefrom for the year. "Profit", although not defined in the Act, has been interpreted to be a net concept. The determination of "profit" is dependent upon the question of whether an expenditure is a proper business expense to be included in the calculation of such net gain (*Daley v. Minister of National Revenue*, [1950] Ex. C.R. 516). In order to arrive at a calculation of net profit, the all-encompassing question one must ask is whether a deduction is prohibited because it is not incurred for the purpose of earning income as required by s. 18(1)(*a*), or because the expense is personal pursuant to s. 18(1)(*h*). It is my view, a view shared by my colleague Iacobucci J., that this determination is essentially an examination of the interplay between s. 9, which allows deductions, and the prohibition of some of these potential deductions by ss. 18(1)(*a*) and (*h*).
>
> 192 These two significant criteria emerged in Cullen J.'s analysis of the case law for the purposes of determining whether an expense may be deducted from business income. He held that: (1) it must be in accordance with ordinary commercial principles and business practice, having regard to the circumstances of each case; and (2) it must be made or incurred for the purpose of gaining or producing income from the business. This test has been applied by this Court in *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*, [1988] 2 S.C.R. 175, in which Wilson J. asserted (at p. 189):
>
>> The only thing that matters is that the expenditures were a legitimate expense made in the ordinary course of business with the intention that the company could generate a taxable income some time in the future. [Emphasis added.]
>
> Such a broad strategy was adopted by the trial judge, as well as by my colleague Iacobucci J. Its main function is to focus on a particular taxpayer and to consider what that taxpayer has legitimately expended in order to do business.

[24] Moreover, in *Stewart v. R.*, 2002 SCC 46, 2002 CarswellNat 1071, the Supreme Court of Canada stated that in order for an activity to be classified as commercial in nature, the taxpayer must have a subjective intention to make a profit.

The Court added that this requires the taxpayer to establish that his or her predominant intention is to make a profit from the activity (paragraph 54).

[25] In this case, although the Appellant earns his professional income from the sale of life insurance policies, the purchase of insurance policies for personal purposes was not made with the predominant intention to make a profit from his professional activity. On the contrary, the predominant intention was to withdraw a commission that was less than the premiums paid to purchase the two policies. Therefore, in this case, the expense was not made with the intention to make a net profit. Furthermore, it is clear, according to the evidence, that the only reason the Appellant purchased these types of life insurance policies, was that he was expecting to receive a non-taxable commission on purchase that would reduce the amount of his insurance costs. The Appellant's intention was not at all to earn taxable commission income. The Appellant has also even said that if he had known that the commission was taxable, he would have never acquired the two policies, and as a result, would not have paid the premiums for which he is now asking a deduction, in accordance with paragraph 18(1)(*a*) of the ITA.

[26] As a result, the premiums paid are not expenses made with the intention to earn taxable income from his profession, but rather with the sole purpose of obtaining personal life insurance at a reduced cost through the commission amount. I therefore rule that the premiums paid are not deductible from his professional income.

[27] Finally, I must address the penalties assessed under subsection 162(2) of the ITA. The provision reads as follows:

> **162(2) Repeated failure to file**.
>
> (2) Every person
>
> (*a*) who fails to file a return of income for a taxation year as and when required by subsection 150(1),
>
> (*b*) on whom a demand for a return for the year has been served under subsection 150(2), and
>
> (*c*) by whom, before the time of failure, a penalty was payable under this subsection or subsection 162(1) in respect of a return of income for any of the 3 preceding taxation years

is liable to a penalty equal to the total of

(*d*) an amount equal to 10% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed, and

(*e*) the product obtained when 2% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed is multiplied by the number of complete months, not exceeding 20, from the date on which the return was required to be filed to the date on which the return was filed.

[Emphasis added.]

[28] Although the Appellant acknowledged not having filed his income tax returns for 2003 and 2004 when required by subsection 150(1) of the ITA**,** he submitted that the Minister did not serve a demand for a return for those years on him and that, as a result, he cannot be subject to the penalty provided for in subsection 162(2) of the ITA.

[29] Ms. Lemieux adduced in evidence the documents entitled "OPTION C" (Exhibit I-8) which contain the dates on which the Appellant filed his income tax returns for the 2000 to 2004 taxation years inclusive. The documents also show the date of the Minister's demand for a return. For 2001 to 2004, the documents show that the income tax return was filed after the Minister's demand for a return.

[30] Ms. Lemieux explained that first the CRA sends a letter to the taxpayer (code TX11) and then, if the income tax return still has not been filed, a second letter is sent, by registered mail, which is the official letter of demand for a return (code TX14D) referred to in the "OPTION C" document filed as Exhibit I-8.

[31] Counsel for the Appellant submitted that the Respondent has no evidence that such a document was sent to the Appellant. Ms. Lemieux traced telephone contacts between the CRA and the Appellant in the CRA's records. For the 2003 taxation return, the date on which the TX14D letter (official letter) was sent in accordance with Option C is January 11, 2005. In that form letter, the taxpayer is given 30 days to file his or her income tax return (Exhibit I-10). On February 9, 2005, the Appellant contacted the CRA to ask for an additional extension, which implies that he did in fact receive the demand (TX14D letter). He was granted the extension. On March 16, 2005, the Appellant contacted the CRA again to obtain another extension, and on April 11, 2005, he filed his income tax return for 2003.

[32] For 2004, Ms. Lemieux did not have the details of the telephone communications with the Appellant, but Option C indicates that the official demand

for a return was sent on February 15, 2006, and the return was filed on April 10, 2006, that is, a little over 30 days after the demand for a return was sent.

[33] I therefore find that the Respondent provided sufficient evidence to show that a demand for a return for the 2003 and 2004 taxation years was served on the Appellant by the Minister. The penalties under paragraph 162(2) of the ITA are therefore upheld.

Decision

[34] The appeals are allowed and the assessments are referred back to the Minister for reconsideration and reassessment on the basis that the Appellant is entitled to eligible meal expenses in the amount of $4,000 for 2003 and $3.125 for 2004. In all other respects, the assessments remain unchanged.

[35] As for the costs, I am not awarding any as I recognize that the CRA misleads taxpayers by adopting an administrative position which seems to be applied at its discretion. Internal policies that go against Interpretation Bulletins should be made public so as to avoid confusion.

Signed at Ottawa, Canada, this 19th day of June 2009.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 27th day of July 2009.

François Brunet, Revisor

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