Docket: 2009-1029(IT)I

BETWEEN:

LUDMILA ZIOBROWSKA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 27, 2010, at Ottawa, Canada

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Suzanie Chua

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* ("*Act*") for the 2007 taxation year is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant's income for 2007 is to be reduced by the amount of $1,600. The Appellant is entitled to costs which are fixed in the amount of $750.

Signed at Ottawa, Canada, this 3rd day of February, 2010.

"Wyman W. Webb"

Webb J.

Citation: 2010TCC64
Date: 20100203
Docket: 2009-1029(IT)I

BETWEEN:

LUDMILA ZIOBROWSKA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The issue in this case is whether the $1,600 that the Appellant had received in 2006 was received by her as a loan from her employer that should be included in her income in 2007.

[2] The Appellant started to work for Statistics Canada on December 4, 2006[1]. She was working 37.5 hours per week (Monday to Friday) and she was paid $18.50 per hour. If she would have received her paycheque for the time that she worked in December in the normal course, she would not have been paid until sometime in 2007. However, instead of waiting for the payroll process, the Appellant's employer gave her two cheques in 2006 – one for $700 and the other for $900. The appellant cashed both cheques in 2006 and deposited the amounts in her bank account.

[3] The first cheque (for $700) identified the period from December 4, 2006 to December 13, 2006. There were 8 working days during this period and 8 days x 7.5 hours / day x $18.50 / hour = $1,110. The second cheque (for $900) identified the period from December 14, 2006 to December 27, 2006. This cheque was cashed on December 22, 2006 and therefore it appears that it was delivered to the Appellant on December 22, 2006. There were 7 working days during the period

[1] I take judicial notice of the fact that December 4, 2006 would have been a Monday.

from December 14 to December 22 (inclusive) and 7 days x 7.5 hours / day x $18.50 / hour = $971.25. It seems clear that the amounts that she received in 2006 did not exceed the amount to which she was entitled based on the hours that she had worked prior to the cheques being issued to her[2].

[4] The cheques indicated that the amounts were "salary advances". The Appellant's employer, as part of the regular payroll process, started paying the Appellant in 2007. Her first paycheque in 2007 included pay for the period starting December 4, 2006. Because the Appellant had already received $1,600 for the work that she had performed in December 2006, this $1,600 amount was deducted from her paycheques in 2007 (spread over several paycheques).

[5] Subsection 5(1) of the *Income Tax Act* (the "*Act*") provides that:

> 5. (1) Subject to this Part, a taxpayer's income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year.

[6] The position of the Respondent is that the two cheques that were issued by the Appellant's employer in 2006 (for $700 and $900) and that were received by the Appellant in 2006 were not remuneration but were loans that were advanced by the Appellant's employer to the Appellant, and therefore the amount of such cheques would not be included in the income of the Appellant until 2007 when these amounts were deducted from the paycheques issued to the Appellant. The Appellant's employer did not issue a T4 slip for 2006 for the $1,600 and included the $1,600 in the T4 slip that was issued for 2007. The position of the Respondent that these amounts could not be remuneration was based in part on the fact that the amounts were even amounts ($700 and $900) and if such amounts would have been remuneration then, after source deductions were made, the amounts would not be exactly $700 and $900. However, the fact that the amounts were $700 and $900 simply means that if the amounts were remuneration the employer failed to deduct the required source deductions. Whether the amounts were remuneration cannot simply turn on whether the amounts were even amounts.

[7] It is the position of the Appellant that she worked in 2006 and that she was paid in 2006. It is her position that, therefore, the $1,600 should be included in her income for 2006 and not 2007. When the Appellant filed her tax return for 2006 she

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[2] Even if the second cheque was delivered December 21, since the first cheque was for $400 less than the amount to which she was entitled, the total of the two cheques would still be less than the amount that she had earned before she received the cheques.

reported that her income from employment was $26,860[3], which was $2,985 more than her income from employment as stated on her T4 slips. The $1,600 that is in issue in this appeal was part of this difference of $2,985. Because her income from employment, based on her T4 slips, was only $23,875, she was assessed for 2006 based on her income as stated on her T4 slips of $23,875.

[8] It seems clear that the employer treated the "salary advances" as loans since no source deductions were taken with respect to the payments made in 2006 and since the Appellant was effectively paid twice for working in December 2006 (with the "overpayment" being deducted from subsequent paycheques). Also the T4 slips issued by the employer are consistent with the employer treating the $1,600 as a loan since no T4 slip was issued for 2006 and the T4 slip issued for 2007 included the $1,600 that the Appellant had received in 2006.

[9] The position of the Respondent appears to be that the employment income is determined by simply examining the T4 slips issued by the employer. Since the $1,600 was not included in any T4 slip issued by the employer for 2006 but was included in the T4 slip issued by the employer for 2007, the position of the Respondent is that the amount must be income in 2007.

[10] In *Merchant v. The Queen*, 2009 TCC 31, [2009] 2 C.T.C. 2174, 2009 DTC 1054 the issue was whether certain amounts that an employee had received and which were identified as "advances" should be included in the income of the employee in the year in which such "advances" were forgiven. The accounting records of the employer reflected the "advances" as loans. The cheques in that case were referred to "NSD cheques[4]". In that case I made the following comments:

> 8 There was no indication that any of the NSD cheques were for advances of any future earnings of the Appellant for services that were to be rendered after the cheque was issued. The amount of several of the NSD cheques was approximately the same amount as the Appellant was paid on a net basis when source deductions were taken.
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> 9 In the accounting records of CSM, an amount equal to the amount of each NSD cheque was treated as a loan made to the Appellant. Therefore the shareholder's loan account for the Appellant (which was identified as a shareholder's loan account even though he was not a shareholder) shows that the amount of each NSD cheque was added to the amount that was payable by the Appellant to CSM. In 1998 and 1999, a

[3] The Appellant had more than one employer in 2006.

[4] NSD – no source deductions.

portion of the amount stated to be payable by the Appellant was converted into salary and set off against the amount stated to be payable by the Appellant to CSM. Source deductions were not reflected in the shareholder's loan account as these amounts were not payable to the Appellant.

10 It is the position of the Respondent that the accounting records of CSM accurately reflect that the NSD cheques represented loans being made by CSM to the Appellant and that the amount of each NSD cheque was properly added to the amount payable by the Appellant to CSM. It is the position of the Appellant that the accounting records do not reflect reality and that the NSD cheques were not issued as advances of loans that were repayable by the Appellant to CSM, but rather were part of the compensation paid by CSM to the Appellant.

11 In *Trudel-Leblanc v. The Queen*, 2003 DTC 257, 2004 DTC 3188, [2005] 2 C.T.C. 2361, Justice Tardif stated that:

> 27. I strongly doubt that the accountants explained the consequences of incorporation. Too often, some accounting and tax professionals have a tendency to assume that the facts should be shaped by accounting entries whereas, in reality, the figures should reflect the facts, not the contrary.

12 In *VanNieuwkerk v. The Queen*, [2003 UDTC 240] 2003 TCC 670, [2004] 1 C.T.C. 2577, Associate Chief Justice Bowman (as he then was) stated that:

> 6. ... It has been said on many occasions in this Court that accounting entries do not create reality. They simply reflect reality. There must be an underlying reality that exists independently of the accounting entries.

13 Accounting entries alone do not determine the tax consequences. It is the underlying reality that is relevant. It is therefore necessary to determine the underlying reality. It seems to me that there are three possible underlying realities in this case:

(a) the NSD cheques were issued by CSM to the Appellant as loans and were to be repaid by the Appellant from whatever sources the Appellant may have available to him;

(b) the NSD cheques were issued by CSM to the Appellant as loans and were to be repaid (and were only to be repaid) by the Appellant from salary or "bonuses" that would subsequently be paid by CSM; or

(c) the NSD cheques were issued by CSM to the Appellant as part of the compensation paid by CSM to the Appellant and were not issued as advances or loans.

…

> 22 In a situation where a cheque is issued (or cash is disbursed) to an employee in relation to services that have been rendered and the transaction is labelled as an advance or a loan but in reality the employee is only obligated to repay the amount, without interest, from subsequent salary or "bonuses" paid by the employer, in my opinion, the real character of the amount received is that it is received as a payment of compensation and not a loan. There is no true intention that the employee will have to repay the amount from any source other than the future "payments" to be made by the employer.
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> …
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> 24 If advances of future earnings are to be included in income if the advances are only to be repaid from such future earnings, then advances of compensation for services already rendered that will only be repaid from future salary or "bonuses" subsequently paid by an employer must be included in income when received. The true character of such "advances" is that they are payment of compensation for services that have been rendered. In this case, I find that the NSD cheques were all issued in relation to services that had been rendered before such cheques were issued.
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> …
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> 26 The third possible reality is that the NSD cheques were issued as part of the compensation paid by CSM to the Appellant and not as loans or advances. This would lead to the same result as the second scenario and no amount would be included in the Appellant's income in 2000 in relation to the alleged interest benefit and no amount would be included in the Appellant's income in 2001 in relation to the alleged debt forgiveness but rather the amounts would be included in the income of the Appellant in the years in which such amounts were received.

[11] The T4 slips issued by the Appellant's employer would be based on her employer's accounting records and would reflect the entries that had been made in these accounting records. As I had stated in the *Merchant* case:

> Accounting entries alone do not determine the tax consequences. It is the underlying reality that is relevant. It is therefore necessary to determine the underlying reality.

[12] In this particular case the Appellant received an e-mail from Maryse Cétoute, Compensation and Benefits Advisor, Statistics Canada dated February 1, 2007. In this e-mail Maryse Cétoute stated that:

> This is to advise you that the salary advance that you received prior to being paid through the Regional Pay System will not be taken off on your first pay. This pay will include all of the outstanding salary owed to you from 04/12/2006 to 2007/01/24. Your advance(s) will be taken on the following regular pays: 2007/02/08 to 2007/02/21, 2007/02/22 to 2007/03/07, 2007/03/08 to 2007/03/21, 2007/03/22 to 2007/04/04 and 2007/04/05 to 2007/04/18 of an approximate amount of $680 from each regular Pay.

[13] The amount was $680 per pay because the Appellant had also received cheques in January 2007 that were identified as salary advances. It seems clear to me that the $1,600 that the Appellant received in 2006 was an amount to which the Appellant was entitled for services rendered and that her employer could have deducted this amount from the first cheque issued from the regular pay system. The fact that the amount was deducted from later paycheques does not change the fact that the Appellant worked in 2006 and was paid in 2006. It does not seem to me that the $1,600 was a loan but was compensation that she had earned and that she had received for services rendered, albeit earlier than she would have received it under the regular payroll system. Her first paycheque issued from the regular pay system should have been for the balance that she was entitled to receive for 2006. The loan was made in 2007 when she received a cheque (or cheques) for the full amount of her pay for 2006 without taking into account the fact that she had already received $1,600 for the work that she did in 2006. She received $1,600 more in the cheques issued in 2007 prior to the cheque issued for the period from 2007/02/08 to 2007/02/21 than she should have since she had already received $1,600 in 2006 for the work performed in 2006. The amount of $1,600 should not have been included in her income in 2007 but, as the Appellant tried to do when she filed her return for 2006, included in her income for 2006.

[14] To find that the amount should not be included in the Appellant's income until 2007 could lead to other deferral arrangements as discussed in the *Merchant* case. If the employer had not paid the full amount for 2006 until a later year (for example 2010) and then deducted from such full amount the $1,600 that the Appellant had previously received, would the Respondent still be taking the position that the $1,600 should not be included in income until 2010 so long as the T4 slips reflected the $1,600 as income in 2010? It does not seem to me that this is the correct result. In this case since the amount was received in 2006 for work performed in 2006, it is income in 2006.

[15] Since this appeal is only in relation to the reassessment of the Appellant's 2007 taxation year, the judgment will only address the reassessment of this year. The

appeal is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant's income from employment for 2007 is to be reduced by the amount of $1,600. The Appellant is entitled to costs which are fixed in the amount of $750.

Signed at Ottawa, Canada, this 3rd day of February 2010.

"Wyman W. Webb"

Webb J.

CITATION:	2010TCC64
COURT FILE NO.:	2009-1029(IT)I
STYLE OF CAUSE:	LUDMILA ZIOBROWSKA AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Canada
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REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	February 3, 2010

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Suzanie Chua

COUNSEL OF RECORD:

For the Appellant:

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Firm:	

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