

TAX COURT OF CANADA

Court Number 2005-4329(IT)I

BETWEEN:

JAMES R. SMYTH

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

DECISION

February 2, 2007

Held at the Federal Court of Canada
Edmonton, Alberta

Volume 1

TAKEN BEFORE:

The Honourable Mr. Justice Brent Paris

APPEARANCES

TAKEN BEFORE:

The Honourable Mr. Justice Brent Paris

(No Counsel)

Appeared for the Appellant

Darcie E. Charlton, Esq.

Appeared for the Respondent

Irene Anselmo

Court Registrar

Deanna Jackson, CSR(A)

Realtime Reporter

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01 (PROCEEDINGS COMMENCED AT 12:54 P.M.)

02 THE REGISTRAR: Order, all rise.

03 The Court will now

04 render a decision in Appeal

05 Number 2005-4329(IT)I between James R. Smyth,

06 the appellant, and Her Majesty the Queen, the

07 respondent.

08 JUSTICE PARIS: Thank you. Please be

09 seated.

10 This is an appeal from a

11 reassessment of the appellant's 2001 and 2002

12 taxation years by which the Minister of

13 National Revenue disallowed his claim for the

14 overseas employment tax credit. The appellant

15 claimed an overseas employment tax credit of

16 \$11,153 in 2001, and \$38,448 in 2002 in respect

17 of his employment income earned in Kosovo where

18 he provided police services within the context

19 of the United Nations Mission there.

20 The issues in this

21 appeal are whether the appellant qualifies

22 under

23 Section 122.3 of the *Income Tax Act* for an OETC

24 in these years, and if not, whether any

25 deduction is available to him under

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01 paragraph 110(1)(f) of the *Act*.

02 The facts relied upon by
03 the Minister in reassessing the appellant are
04 set out in paragraph 10 of the amended
05 reply to notice of appeal and will form part of
06 these reasons. (annexed as schedule 1)

07 The respondent has
08 indicated in the amended reply that the
09 appellant provided police services in Kosovo
10 rather than Bosnia Herzegovina as originally
11 assumed. This was born out by the evidence,
12 and nothing turns on this minor error in the
13 assumptions.

14 Section 122.3 sets out
15 several conditions that must be met in order
16 for a taxpayer to qualify for the tax credit.
17 The relevant parts of Section 122.3(1)
18 read as follows:

19 If an individual is resident in
20 Canada in a taxation year and,
21 throughout any period or more than 6
22 consecutive months that began before
23 the end of the year and included any
24 part of the year...

25 (a) was employed by a person who was a

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01 specified employer, other than for the
02 performance of services under a
03 prescribed international development
04 assistance program of the Government
05 of Canada, and
06 (b) performed all or substantially all
07 the duties of the individual's
08 employment outside Canada
09 (i) in connection with a contract
10 under which the specified employer
11 carried on business outside Canada
12 with respect to...
13 (C) any prescribed activity, or
14 (ii) for the purpose of obtaining, on
15 behalf of the specified employer, a
16 contract to undertake any of the
17 activities referred to {above}..."

18 Section 122.3 then sets out the
19 method of calculating the OETC.

20 The first question that
21 must be decided is by whom the appellant was
22 employed while working in Kosovo. The
23 appellant argues that he was employed by the UN
24 in Kosovo and that his employment relationship
25 with the Edmonton Police Service was severed

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01 prior to his commencing work in Kosovo.

02 He referred to the
03 evidence of two witnesses from the Edmonton
04 Police Service who had participated in the same
05 UN Mission in Kosovo, as well as to his own
06 evidence that the work done there was outside
07 the collective agreement between the Edmonton
08 Police Service and Edmonton Police Association
09 and that, in particular, the terms of the
10 collective agreement relating to working hours
11 and working conditions were not adhered to.

12 The appellant also
13 referred to a document, Exhibit A-4, entitled
14 "Certification of Employment," issued by the
15 assistant director of administration, UN
16 Mission in Kosovo Police, that certified that
17 the appellant was employed as a civilian police
18 officer by the UN Mission in Kosovo. It also
19 stated the appellant was compensated at a rate
20 of \$71 US a day while employed with the UN
21 Mission in Kosovo Police.

22 I cannot agree with the
23 appellant's arguments on this point. The
24 evidence of Sergeant Glen Hayden of the
25 Edmonton Police Service, who was a member of

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01 the Edmonton Police Association executive, was
02 that the appellant did not cease to be a member
03 of either the Edmonton Police Service or the
04 Edmonton Police Association while with the
05 UN Mission.

06 The documentary evidence
07 shows the appellant received his regular salary
08 from the Edmonton Police Service and was
09 entitled to certain benefits provided in the
10 collective agreement. Those benefits included
11 credit for calculating his seniority and
12 pension in respect of time worked in Kosovo and
13 coverage under medical and dental plans.

14 I can see nothing in the
15 documentation to suggest that the appellant's
16 employment with the Edmonton Police Service was
17 severed at any point in the years in issue. It
18 appears, rather, the appellant was permitted
19 within the course of his employment to
20 participate in the Kosovo Mission under the
21 conditions set out in Exhibit R-1, the letter
22 of agreement between the Edmonton Police
23 Service, the RCMP, and the appellant and his
24 coworker, Constable Stolarchuk.

25 The fact that the

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01 Edmonton Police Service was a signatory to that
02 agreement is indicative of the ongoing
03 relationship between the individual
04 participants and the EPS. And in particular, I
05 refer to paragraph 2.1 and 2.2 of the agreement
06 by which the Edmonton Police Service agrees to
07 provide the participants as part of the
08 UN Mission and to make them available for the
09 Mission.

10 The Edmonton Police
11 Service also retained control over the
12 participants in the event that they failed to
13 comply with the UN operational guidelines for
14 the UN Police Force.

15 The fact that the
16 Edmonton Police Service was reimbursed the cost
17 of the participant's salary and benefits by the
19 RCMP does not alter the pre-existing employment
20 relationship, and I note that the agreement
21 also provided that the participants would not
22 be considered employees of the RCMP.

23 With respect to the
24 certification of employment issued by the
25 United Nations Mission in Kosovo, Exhibit A-4,

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01 there is no evidence as to the basis on which
02 the certification was made. The document does
03 not purport to be a contract of employment, and
04 no contract between the appellant and the UN
05 was produced at the hearing.

06 To the extent that
07 Exhibit A-4 contradicts the arrangements made
08 by the Edmonton Police Service, the RCMP, and
09 the appellant himself regarding the his
10 participation in the mission as set out in the
11 letter agreement, I would attach little weight
12 to it. It appears to have been prepared for
13 limited purpose and cannot be taken to
14 displace the letter agreement without the
15 express consent of all of the parties to the
16 letter agreement.

17 The appellant may have
18 taken on duties and responsibilities outside of
19 those of a normal police officer working in
20 Edmonton, but this was by agreement between
21 Edmonton Police Service and the appellant.
22 Similarly, the appellant agreed to perform the
23 work according to the conditions set out in the
24 UN guidelines.

25 There is nothing before

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01 me to show that the appellant was prevented
02 from agreeing to these terms and conditions
03 while continuing his employment with the
04 Edmonton Police Service. Therefore, I find
05 that the appellant was in fact employed by the
06 Edmonton Police Service while performing his
07 duties in Kosovo.

08 The next matter to be
09 decided is whether the work performed by the
10 appellant in Kosovo was performed in connection
11 with a contract under which the Edmonton Police
12 Service carried on business outside Canada as
13 required by Subsection 122.3(1) of the act.

14 The appellant argues
15 that it is sufficient for the Edmonton Police
16 Service to provide services in connection with
17 a contract under which the RCMP carried on
18 business outside Canada. He relies in this
19 respect on the decision of this Court in
20 *Gonsalves v. The Queen*, 2000 DTC 1491.

21 The difficulty with this
22 position is that in order for either the
23 Edmonton Police Service or the RCMP to be found
24 to be carrying on business, there would need to
25 be evidence that they were undertaking the

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01 is not open for me to speculate as to the
02 nature of those agreements.

03 For these reasons, I
04 find that the appellant's employment in Kosovo
05 does not meet the conditions set out in
06 subparagraph 122.3(1)(b)(i) of the *Act*, and he
07 is not entitled to the OETC for 2001 and 2002.

08 While the appellant did
09 not present any arguments to support a claim
10 for deduction under paragraph 110(1)(f) of the
11 *Act*, he did raise the matter in his Notice of
12 Appeal, and counsel for the respondent
13 addressed the point.

14 I agree with the
15 respondent that no deduction under that
16 provision is available. I have already found that the
17 appellant was employed by the Edmonton Police
18 Service during the relevant period, and
19 therefore, his income from employment does not
20 fall within 110(1)(f)(iii), which is income
21 from employment with a prescribed international
22 organization. Furthermore,
25 subparagraph 110(1)(f)(v) was not added to the

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01 *Act* until 2005 and is only applicable to
02 taxation years after 2003.

03 The appellant also
04 challenges the interest and penalties assessed
05 by the Minister in this case. The appellant
06 points out that he claimed the credit on the
07 advice of his employer and, in particular, upon
08 the advice of Daniel Jones who heads the
09 international peacekeeping policing program at
10 the Edmonton Police Service.

11 Jones also was one of
12 the first members of the Edmonton Police
13 Service to serve in Kosovo. Jones gave
14 evidence that he made inquiries at the Edmonton
15 CRA office as to whether he was entitled to the
16 overseas employment tax credit for income he
17 earned while working in Kosovo under the same
18 program as the appellant later worked and was
19 told he qualified.

20 Jones, on behalf of the
21 Edmonton Police Service, subsequently advised
22 other participants that they were able to claim
23 the credit. Evidence was also given by
24 Constable Stolarchuk that there was a great
25 deal of confusion at the CRA over her claim for

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01 the OETC which was initially disallowed, then
02 allowed, and finally disallowed again.

03 There is ample
04 jurisprudence to the effect that the Minister
05 is not bound by the representations of his
06 employees, and the Court does not have the
07 jurisdiction to order that penalties and
08 interest be reduced except where the act --
09 where the appellant has shown that those
10 amounts were not calculated and imposed in
11 accordance with the provisions of the
12 *Act*.

13 The appellant did not submit
14 that the penalties and
15 interest were not in accordance with the *Act*
16 but suggested that, as a matter of
17 equity, they should be deleted. Unfortunately,
18 I do not have the power to do that. I can,
19 however, express my opinion that this would be
20 an appropriate case for the waiver of penalty
21 and interest under the provisions of the
22 fairness package for the period preceding the
23 reassessment, given that the appellant's claim
24 for the overseas employment tax credit was
25 based on erroneous advice provided by the CRA.

SCHEDULE 1

10. In so reassessing and confirming the tax of the Appellant, the Minister relied on the same assumptions of fact, as follows:

- (a) throughout the 2001 and 2002 years, the Appellant was a resident of Canada;
- (b) during the 2001 and 2002 years, the Appellant was employed by the Edmonton Police Service, ("EPS");
- (c) EPS entered into an agreement with Her Majesty the Queen in right of Canada as represented by the Royal Canadian Mounted Police, (the "RCMP") to provide police services on international peace support operations, (the "Agreement");
- (d) pursuant to the Agreement, the Appellant provided police services in Bosnia-Herzegovina from November 2, 2001 to August 2, 2002;
- (e) the Appellant received employment income from EPS in 2001 and 2002 of \$82,840.00 and \$67,851.00 respectively;
- (f) the Appellant did not receive any other employment income in the 2001 and 2002 years, other than the amounts received from the EPS;
- (g) the Appellant claimed the OETC based on employment income earned while in Bosnia-Herzegovina of \$11,153.00 in 2001 and \$38,448.00 in 2002;
- (h) neither the RCMP or the EPS carried on business outside of Canada; and
- (i) the EPS did not have a contract with the United Nations.