Docket: 2010-686(IT)I

BETWEEN:

LISA DALE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on September 28, 2010, at Toronto, Ontario.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	William D. Howse
Counsel for the Respondent:	Samantha Hurst and Evan Duffy (student-at-law)

JUDGMENT

The appeals from the reassessments made by the Minister of National Revenue under the *Income Tax Act* for the appellant's 2005 and 2006 taxation years are allowed, without costs, and the reassessments are referred back to the Minister for reassessment and reconsideration on the basis that 75% of the motor vehicle expenses shall be allowed as having been incurred for business purposes.

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

"Lucie Lamarre"

Lamarre J.

Citation: 2010 TCC 561
Date: 20101103
Docket: 2010-686(IT)I

BETWEEN:

LISA DALE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lamarre J.

[1] These are appeals from reassessments for the appellant's 2005 and 2006 taxation years made by the Minister of National Revenue (**Minister**) under the *Income Tax Act* (**ITA**). In so reassessing, the Minister disallowed, among other things, motor vehicle expenses in the amounts of $3,866 for 2005 and $2,950 for 2006 claimed by the appellant against her sales commission income for those years.

[2] It is not disputed that the appellant is, and was in those years, a self-employed residential real estate agent registered with RE/MAX Aboutowne Realty Corporation (**RE/MAX**) in Oakville, Ontario, and that she was remunerated on a commission basis. During the 2005 and 2006 taxation years, she earned $81,440 and $79,552 respectively in commissions, and claimed business expenses in the amounts of $74,105 and $54,204, of which the Minister disallowed $4,888 and $3,793 for each of those years respectively. The appellant takes issue only with the disallowance of motor vehicle expenses.

[3] It is not disputed that the appellant drove a total of 31,185 and 23,693 kilometres in 2005 and 2006 respectively. She argued that 95% of those kilometres were driven for business purposes, and it was on that basis that she claimed motor vehicle expenses in the amount of 8 151 $ for 2005 and 6 201 $ for 2006. However, she did not keep a log book or any other record of how many kilometres were driven for business purposes. As a result, the minister only accepted 55% of the total kilometres as having been driven for business purposes, which explains why $3,866 and $2,950 for 2005 and 2006 respectively were disallowed out of the total motor vehicle expenses initially claimed (see Reply to the Notice of Appeal, Schedules A and B).

[4] The only issue before me is whether 95% of the total distance driven by the appellant in each of the years in question was in fact driven for business purposes.

[5] The appellant submits that it is not a requirement of the ITA that a log book be kept, and that the Minister arbitrarily decided that, absent a log book, she was not entitled to claim more than 55% as a business expense. She intended to call John Meehan, a licensed real estate agent and sole owner and manager of RE/MAX Unique Real Estate since 1996, as an expert witness to testify regarding the driving habits of self-employed real estate agents, and more particularly regarding the impracticality of keeping a log book as seems to be required by the Minister.

[6] The respondent brought a motion for an order excluding the admission into evidence of the expert report and the testimony of John Meehan on the basis that this evidence would distract from the real issue here, which is the business use of the motor vehicle by the appellant in 2005 and 2006. The respondent relied on the Supreme Court of Canada decision in *R. v. Mohan*, [1994] S.C.J. No. 36 (QL); [1994] 2 S.C.R. 9. In that case, the Supreme Court said that expert evidence should not be admitted where there is a danger that it will be misused or will distort the fact-finding process. It referred to another Supreme Court decision, *R. v. Abbey*, [1982] 2 S.C.R. 24, in which it was said, at page 42, that "[i]f on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (citing *R. v. Turner* (1974), 60 Crim. App. R. 80, at page 83). In *Mohan*, at paragraph 22 (QL), the Supreme Court stated that the expert opinion is necessary if it provides information which is likely to be outside the experience and knowledge of a judge. The court also spoke of the concern that experts be not permitted to usurp the functions of the trier of fact (paragraph 24 QL).

[7] In the present case, the respondent stresses on the fact that the question at issue concerns the business use of the motor vehicle by the appellant, which is purely a question of fact, for which there is no need for an expert. Furthermore, the respondent

challenges the report as such as it relies on the opinion of others, including counsel for the appellant.

[8] With respect to the opinion of counsel for the appellant, counsel for the respondent quotes McColl J. in *Surrey Credit Union v. Willson*, 45 B.C.L.R. (2d) 310 (B.C.S.C.), referred to by McArthur J. of this Court in *Brampton Vee World Motors Ltd. v. Canada*, [2004] T.C.J. No. 652 (QL), at paragraph 4. McColl J. stated the following:

> Expert opinions will be rendered inadmissible when they are nothing more than the reworking of the argument of counsel participating in the case. Where an argument clothed in the guise of an expert's opinion is tendered it will be rejected for what it is.

[9] With respect to the reference by Mr. Meehan in his report to Mr. Valeri Volkov, a certified public accountant, counsel for the respondent stated that it was not admissible as Mr. Volkov was not present to be cross-examined.

[10] Both counsel for the appellant and Mr. Volkov are practitioners apparently specializing in the real estate industry. In his report, Mr. Meehan relied on their assessment regarding the practical aspects of agents' maintaining an automobile log book. I decided in court to accept Mr. Meehan's testimony and report, but only with respect to his factual knowledge of the driving habits of sales agents, as he himself had been a sales agent for many years and is now managing a broker's office and dealing with many sales agents. All references to advice received from counsel for the appellant and Mr. Volkov, and all references to Mr. Meehan's personal opinion as to what is required and what should be considered as reasonable under the ITA will be struck out since, as regards the former, it has nothing to do with Mr. Meehan's own knowledge and experience as a sales agent, manager and broker, and, as regards the latter, it is not his function but mine to decide whether the assessment is valid under the ITA.

[11] That being said, Mr. Meehan was in fact put on the stand by counsel for the appellant, and his report was entered as Exhibit A-1, but only for consideration of the portions related to his testimony before me. Mr. Meehan testified that he had been a licensed real estate agent in Ontario since 1983. In 1989, he became a manager for Royal Lepage Real Estate Services and since 1996 has been the sole owner and manager of his own office, RE/MAX Unique Real Estate, and has had an average of 55 agents under contract with that office over 15 years.

[12] Mr. Meehan described the work of real estate sales agents as consisting in visiting as many houses as possible and attending open houses for agents only from Monday to Saturday, from 11 a.m. to 1 p.m., so as to have an idea of the inventory of properties for sale. Since 2000, sales agents have access to the Multiple Listing Service (**MLS**) from their home office or from their off-site offices, which means that they do not need to go to the RE/MAX office as often as in the past. He personally reduced by half the floor area of his RE/MAX office since he does not need as many computer monitors (he now has 3 compared to 15 to 20 before 2000) for use by his sales agents, who now very seldom go to the office to access MLS. He said that a sales agent drives around looking at houses, meeting clients or other agents, and taking clients to visit houses in the evenings. If a client makes an offer, the agent goes back to his office, prepares the offer, registers it and goes to present it to the seller. When the initial offer is not acceptable to the seller, the agent goes back and forth between the seller and prospective purchaser, or may fax back and forth if that possibility is available, until the offer is accepted. When the agent obtains a listing, he or she arranges an open house, meets with prospective buyers and shows the house.

[13] Mr. Meehan testified that most of his sales agents work eight to ten hours a day and that they work on weekends. He basically said that the agents are in their car from morning until night. With respect to log books, he said that real estate sales agents do not generally keep records of their mileage, as it is not realistic or practical to do so. He himself never kept a log book. He was not able to say how many hours a high-performing real estate agent spends in his or her car. He could only assume that it would be 80 to 95 per cent of their working time.

[14] Mr. Meehan stated that he was not familiar with real estate agents' work in Hamilton, which is the area covered by the appellant. He noted, however, that the price of houses there was significantly less than in Toronto.

[15] In cross-examination, he acknowledged that he had no idea how burdensome it would be to keep a log book for a full tax year. He admitted that he did not accompany his agents to verify what their actual driving time was. He could only estimate that time. He recognized that he had not himself been a sales agent for the past 21 years, and that things had changed considerably over that period.

[16] In re-examination, he stated that a comparatively successful full-time real estate agent like the appellant would make an average minimum of ten to fifteen trips in his or her car each day of the year. In his report, he said that that included business and personal trips (see Exhibit A-1, paragraph 15). Keeping a log book means that you have to enter the starting point, the distance, the name of the client, and then enter the same information for the return trip. He also stated that the amount of

driving has not changed over the years, but suggested that the car has become for all intents and purposes an office. With social networking, there is no need to go to the office as often as in the past.

[17] The appellant then testified. She said that she was licensed in 2000 and has been a full-time real estate agent ever since. In 2005, she moved to Hamilton from Toronto and started working for a RE/MAX broker in Oakville, which is half way between Toronto and Hamilton and was approximately 40 km from her new residence. She lived with her boyfriend in a flat and rented a separate room in the same building that she used as office space, where she had a computer, a fax machine, filing cabinets for her records, and a phone line. She went to the brokerage's office to deliver signed offers. She paid RE/MAX for the use of a workstation that was assigned to her at the brokerage and she kept personal effects in a drawer there. That workstation was in a space that she shared with other agents. She also had a direct phone line at RE/MAX and received "junk" mail there. However, RE/MAX charged her for long distance calls and for the use of the photocopier machine. She said that she probably went to the RE/MAX office once a month (transcript, p. 124).

[18] In terms of personal driving, she claims that she practically never drove for personal needs. She lives across from a mall where she has access to almost everything she needs. Her friend drives a Toyota Corolla and whenever they go out together, which is fairly rare, they use his car. She did not take any holidays in the years at issue, other than statutory holidays. She said that she worked "pretty much from the time [her] eyes open[ed] until they shut" (transcript, p. 60), i.e. from 10 to 16 hours a day (transcript, p. 107). She would briefly visit her mother in Toronto when her work took her there.

[19] In terms of driving for work purposes, she drove a 1992 Lexus (see Question 3 in Exhibit 2 to Exhibit A-1). In the years at issue, she was not familiar with the market in Hamilton and its environs. She had to visit 20 to 30 houses to fix an accurate price on a newly listed house. She visited neighbourhoods and homes on a constant basis. She said that for every client there were two or three potential clients who slipped through her fingers. When she represented a buyer, she would visit 25 to 30 houses beforehand, of which she would show that client only a few. She also held open houses in Oakville for other agents on weekends in order to try to and get higher-priced listings. She advertised in Toronto and had listings in Etobicoke, Richmond Hill and Stoney Creek. In the years in question, she had a potential commercial client who was looking for multiple properties in downtown Toronto. If successful, she could have earned $50,000 to $60,000 from that client, but nothing materialized. Still, a lot of driving had been required. She had also had clients who were selling their home in Hamilton and looking for a new home in Toronto. In

addition, she attended conferences and training seminars in Mississauga, Guelph and Markham. She estimated her time spent in her car for work purposes at from eight to twelve hours a day.

[20] According to her, it is a mathematical impossibility that she could have been in her car for personal purposes 45 per cent of the time as argued by the respondent. She said that she had attempted to keep a log book several times but was not able to keep it up. The result would have been that either she "would lose all of [her] clients" or that "it would bottleneck [her] performance" (see transcript, p. 77).

[21] The appellant produced in evidence her sales records (Exhibit 3 to the report filed as Exhibit A-1). In the first quarter of 2005, she had zero sales. She explained that there were two reasons for that: 1) she was starting in a new territory; and 2) it takes on average three months for a sale to close. In the second quarter of 2005, she made two sales, for which she represented both the seller and the buyer. She received over $18,000 in commissions for those two sales. In the third quarter of 2005, she had five sales, with total commissions of $26,310. In the fourth quarter of 2005, she made six sales and earned $37,230 in commissions.

[22] In 2006 (Exhibit 4 to Exhibit A-1), she earned $10,480 for two sales in the first quarter, $18,250 for three sales in the second quarter, $13,000 for two sales in the third quarter, and $42,197, for nine sales in the last quarter.

[23] She said that real estate is extremely cyclical. For quite a few transactions, she represented both the buyer and seller, which means a lot of driving around. She also explained that the chronology of the performance of her work was not necessarily reflected in the closing dates of her sales (transcript, p. 87). She said that in both years she received the RE/MAX Executive Club Award, which was based on commissions, and her commissions were just enough to put her in the top half among agents in her office (Exhibit 2 to Exhibit A-1, 3rd page).

[24] In cross-examination, she said that she was obligated by law to keep her files on her clients for a long period of time (homes shown, whether sold or not). She said, however, that she could not extrapolate from those files the mileage driven in a year for her work because one house shown does not necessarily mean only one trip to that house (sometimes, for whatever reason, you cannot access the house at the time planned). She reiterated that the effort to compute the hours driven for work purposes would likely compromise her ability to earn a living (transcript, p. 119).

[25] She also acknowledged in her cross-examination that she stated in Exhibit A-2, paragraph 6, that for every listing in the years at issue her RE/MAX office required originals of all paperwork, meaning that she would have had to stop

by at the office. In 2006, she stated in examination in chief, she made 16 closings, which means that she would have had to go to the RE/MAX office more than once a month. She simply replied to that that she had not been accurate in that part of Exhibit A-2, that there had been an oversight (transcript, pp. 126-127).

[26] In re-examination, the appellant explained why she had a workstation at RE/MAX. She said that it cost her $300 per month and that the broker would take 30 per cent of her commission on every sale until she had earned $40,000 in commissions. If she had not paid for a workstation, the broker would have taken a lesser percentage of her commissions (5 per cent instead of 30 per cent), but would have charged $900 a month for the privilege of working with RE/MAX. She explained that by keeping her monthly fees lower she was able to have a financial safety net, as RE/MAX was taking its money only when she had sales (transcript, pp. 130-132).

[27] The respondent filed an affidavit by Adrienne Lake, a manager with RE/MAX Aboutowne Realty in Oakville (Exhibit R-1). She stated, among other things, that the office has about 30-35 workstations for the salespeople associated with the office. She also stated that most of the 80 agents/salespeople do not have an assigned workstation. The appellant has an office permanently assigned to her at the RE/MAX place of business, that she shares with two other agents, and that she had such an office in the years at issue. The appellant has an assigned workstation with a telephone extension in that assigned office, and she has a personal mail slot. Ms. Lake could not, however, comment on the particulars of the appellant's work or driving schedule (par. 20). She confirmed that the appellant won an Executive Club award in 2005 and 2006, which means that she made over $50,000 in the year in commissions. Ms. Lake also stated that 17 or 18 agents made over $100,000 in commissions in 2009, and 5 or 6 agents earned over $250,000 in commissions in that year.

[28] The appellant seeks a decision that will determine what obligations a real estate salesperson must meet in order to prove the amount of driving done for business purposes. The appellant states that keeping a log book is hardly feasible and is not a requirement under the ITA. The appellant stated that the trade record sheets required by the Ontario Real Estate Association, and referred to in her cross-examination, are no help in determining how much driving is done because what is required on those sheets is related to offers and sales, not to driving. Further, the situation has changed significantly since 2000 in that agents can now access MLS from their home office. There is no need to go to the broker's office as often as in the past. In the case of the appellant, her principal place of business is her home, and the moment she gets in the car, it is for business purposes, even though she goes to the RE/MAX office once in a while to drop off offers when she cannot e-mail or fax

them, or to attend a meeting there to promote one of her listings. In the appellant's view, the mere fact that she did not keep a log book does not mean that she did not use her car for business purposes 95 per cent of the time. The position taken by the respondent is, according to the appellant, arbitrary, unreasonable and not based on the real facts. She relied on the case of *Qureshi v. Canada (Minister of National Revenue)*, [1991] T.C.J. No. 834(QL), in which Judge Tremblay, as he then was, held that it is not necessary to keep a log book to show how much an automobile is used for business purposes, as this is not required by section 230 of the ITA.

[29] For the respondent, the real issue is a question of fact, namely determining the proportion of business versus personal driving. This is not about log books. However, section 230 of the ITA requires a taxpayer to keep records and books of account. The respondent states that that requirement exists to enable the authorities to determine the tax payable, whatever it may be. By keeping driving records, the taxpayer provides some kind of objective evidence.

[30] In the respondent's view, the appellant was very general in her testimony. It would not have been too burdensome for her to keep records of her personal driving. In *Njenga v. Canada*, [1996] F.C.J. No.1218 (QL), the Federal Court of Appeal said that the taxpayer was responsible for documenting her own personal affairs in a reasonable manner. In *Watts v. Canada*, [2005] T.C.J. No. 515 (QL), Sarchuk J. required a log book for a taxpayer claiming motor vehicle expenses as employment expenses. In the *Watts* case, the taxpayer earned $2,500 in the year and alleged that 87% of the use of the vehicle was related to work. The respondent argued that in the present case, the appellant declared $7,335 (see Reply to the Notice of Appeal, par. 8) as net business income in 2005 and claimed 95% for business travel. According to the respondent, there is not a big difference between the present case and the *Watts* case. In *Chrabalowski v. Canada*, [2004] T.C.J. No. 488 (QL), Bowman A.C.J., as he then was, took into account the fact that the taxpayer did not keep a log book in upholding the assessment reducing the automobile expenses incurred for work purposes. He stated at paragraph 13 that he did not think that it was a particularly onerous task for a person claiming employment expenses to keep a record of these expenses as well as a log book of automobile expenses. Finally, the respondent does not seem to challenge the view that, when the taxpayer has his or her principal place of business at home, any driving from home for work purposes is a business use of the vehicle (see *Canada v. Cork*, [1990] F.C.J. No. 429 (QL)). However, the respondent is of the view that when the appellant drives from her home to the RE/MAX office, that is personal use (counsel for the respondent referred to Webb J.'s decision in *Rawlinson v. Canada*, [2009] T.C.J. No. 391 (QL)).

Analysis

[31] Subsection 230(1) of the ITA reads as follows:

> **230.** (1) Every person carrying on business and every person who is required, by or pursuant to this Act, to pay or collect taxes or other amounts shall keep records and books of account (including an annual inventory kept in prescribed manner) at the person's place of business or residence in Canada or at such other place as may be designated by the Minister, in such form and containing such information as will enable the taxes payable under this Act or the taxes or other amounts that should have been deducted, withheld or collected to be determined.

[32] The appellant will be able to deduct her motor vehicle expenses to the extent that she can prove that she incurred them to earn her commission income. It is not disputed that she is self-employed, and thus, it is section 18 of the ITA which applies. Paragraph 18(1)(*a*) states:

> **18.** (1) In computing the income of a taxpayer from a business or property no deduction shall be made in respect of
>
> General limitation
>
> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property.

[33] The appellant also must establish that the expenses claimed are reasonable. Section 67 of the ITA reads as follows:

> **67.** In computing income, no deduction shall be made in respect of an outlay or expense in respect of which any amount is otherwise deductible under this Act, except to the extent that the outlay or expense was reasonable in the circumstances.

[34] I agree with the appellant that keeping a log book for automobile expenses is not specifically required by the ITA. However, by not doing so, she faces a heavier burden in proving that she used her motor vehicle almost exclusively for business purposes. The question to be resolved here is a pure question of fact. The appellant is the only one who knows exactly what use she made of her car in the year. At the same time, the Minister's role in auditing a taxpayer is to ascertain whether he or she has complied with the ITA. In this case, the Minister cast doubt on the claim that 95% of the appellant's travel was for business purposes. The Minister rightly

assumed that every person has personal needs and determined that, absent any other objective evidence, 55% would be a more appropriate figure for business travel.

[35] It is my understanding that the appellant asked Mr. Meehan to testify in order to, among other things, give weight to her testimony that she really used her motor vehicle almost exclusively for business purposes and that keeping a log book was practically impossible. However, Mr. Meehan could only assume what the appellant's driving habits, and those of the sales agents working for him were. Apart from stating that the sales agents are almost always in their cars, he did not have any factual knowledge in this regard. With respect to log books, he said that sales agents do not usually keep them, although they ought to, and testified that he himself never kept one.

[36] A log book has its usefulness. It permits a taxpayer to demonstrate with greater accuracy the extent of business use and of personal use. Although I understand that keeping a log book may be tedious and may not always be practical when one is with clients, the appellant did not convince me that she "would lose all of [her] clients" or that the effort to compute her hours driven for work purposes would "eclipse [her] ability to earn a living" or "bottleneck [her] performance". I understand that she did have to visit many houses and quite a few neighbourhoods in her new territory and that she covered a wide area. The reality is that she closed 13 transactions in 2005 and 16 in 2006. I think she would have had time to enter the required information in a log book at the end of the day.

[37] The expenses claimed must be reasonable pursuant to section 67 of the ITA. At first blush, claiming 95% of the automobile expenses as having been incurred for business purposes is not reasonable. Everyone has personal needs. This is why, if it is true that the appellant drove her car for business purposes 95% of the time, the necessity for a log book is all the greater. If she did not have time to report all her business driving, which I seriously doubt, she could have reported her personal driving. When a taxpayer claims a more reasonable amount, the need for a log book to convince the authorities or the court becomes less critical, as one can easily imagine the amount of driving required in a given industry (as in *Qureshi*, *supra*, referred to by counsel for the appellant).

[38] Here, the appellant had an office at home but also had one at the Re/max brokerage in Oakville, where she did have to attend periodically, i.e. at least once a month. Her mother lived in Toronto and the appellant visited her there once in a while. What was personal use of the car and what was business use is not crystal clear from the evidence before me.

[39] The appellant filed in evidence a proposal made by the Minister to allow 75% of the motor vehicle expenses as being related to business use (Exhibit A-5). In the circumstances, I find this proposal reasonable.

[40] I will therefore allow the appeals, without costs, and the reassessments will be referred back to the Minister for reassessment and reconsideration on the basis that 75% of the motor vehicle expenses shall be allowed as having been incurred for business purposes.

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

"Lucie Lamarre"

Lamarre J.

CITATION:	2010 TCC 561
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PLACE OF HEARING:	Toronto, Ontario
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APPEARANCES:

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COUNSEL OF RECORD:

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Name:

Firm:

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