Docket: 2011-524(IT)I

BETWEEN:

VICTOR G.E. KREUZ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 15, 2012, at Toronto, Ontario.

Before: The Honourable Justice Johanne D'Auray

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	John Grant Leslie Ross

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* (**Act**) for the 2007 taxation year is allowed with respect to the penalties assessed under subsection 162(2) of the Act and dismissed with respect to the motor vehicle travel expenses claimed by the appellant.

Signed at Ottawa, Canada, this 5th day of July 2012.

"Johanne D'Auray"

D'Auray J.

Citation: 2012 TCC 238
Date: 20120705
Docket: 2011-524(IT)I

BETWEEN:

VICTOR G.E. KREUZ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

D'Auray J.

[1] The issues in this appeal are:

a. Whether the appellant is entitled to deduct the amount of $4,102 as motor vehicle travel expenses for his 2007 taxation year;

b. Whether the appellant is liable to pay a penalty under subsection 162(2) of the *Income Tax Act* (**Act**) for repeated failures to file his 2007 tax return within the time limits set by the Act;

[2] In my view, the appellant is not entitled to deduct his travel expenses, as he does not meet the requirements of section 8 of the Act, more particularly, subsection 8(10) and paragraph 8(1)(*h.1*).

[3] I am also of the view that the appellant is not liable to pay the penalty under subsection 162(2) of the Act.

[4] The appellant is employed as an occasional teacher for two school boards, namely the Peterborough Victoria Northumberland and Clarington Catholic District School Board (**Catholic Board**) and the Kawartha Pine Ridge District School Board (**Public Board**).

[5] As an occasional teacher, the appellant worked at various schools for the two boards.

[6] The appellant was not reimbursed by either board for his travel expenses in travelling to the various schools.

[7] For the year under appeal, the appellant was not provided with the prescribed form (**T2200 form**) by either of the boards, as contemplated by subsection 8(10) of the Act, certifying that he met the conditions of paragraph 8(1)(*h.1*) of the Act.

Previous appeals by the appellant in respect of motor vehicle travel expenses

[8] This is not the first time that the appellant has appealed to this Court in respect of his motor vehicle travel expenses. He appealed in both the 2005 and 2006 taxation years.

[9] On August 17, 2009, Justice McArthur rendered a judgment with respect to the appellant's 2005 taxation year.

[10] Justice McArthur concluded that the appellant was not entitled to deduct his motor vehicle travel expenses incurred in teaching at Public Board schools.

[11] Justice McArthur found that the appellant did not meet the requirement in subsection 8(10) of the Act, in that he did not have the T2200 form signed by the Public Board certifying that the conditions set out in paragraph 8(1)(*h.1*) of the Act were met.

[12] With respect to the Catholic Board, Justice McArthur concluded, after an analysis of paragraph 8(1)(*h.1*) of the Act, that the appellant was entitled to deduct his motor vehicle travel expenses. Justice McArthur found that the appellant satisfied subsection 8(10) of the Act. The appellant had a T2200 form signed by a representative of the Catholic Board, certifying that he met the conditions set out in paragraph 8(1)(*h.1*) of the Act (see paragraphs 8 to 18 of Justice's McArthur reasons for judgment).

[13] On March 16, 2011, I heard the appellant's appeal on motor vehicle travel expenses with respect to his 2006 taxation year.

[14] The expenses associated with the Catholic Board were resolved by a judgment on consent (see Respondent's Book of Authorities, Tabs 7 and 8).

[15] The appellant did not have a T2200 form with respect to his Public Board motor vehicle travel expenses. Nor did he present any evidence showing exceptional circumstances for not having the form. I therefore concluded that the appellant was not entitled to deduct his motor vehicle travel expenses since he did not have a T2200 form signed by his employer. As the T2200 form is a condition precedent to claim motor vehicle travel expenses, I did not examine whether the appellant met the requirements under paragraph 8(1)(*h.1*) of the Act.

[16] I therefore allowed the appeal pursuant to the Consent to Judgment for the Catholic Board and dismissed the appeal with respect of the Public Board.

The present appeal

[17] Although the conditions of employment of the appellant for the 2007 taxation year are the same as they were in the 2005 and 2006 taxation years, there are two important factual distinctions from the two previous hearings.

[18] The first distinction is that the Catholic Board did not provide for the 2007 taxation year, as it did for the 2005 and 2006 taxation years, a T2200 form pursuant to subsection 8(10) of the Act. Consequently, the appellant did not have for the year under appeal, a T2200 form certifying that he met the conditions in paragraph 8(1)(*h.1*) from either the Catholic Board or the Public Board.

[19] The second distinction is that unlike the two previous hearings where there were no witnesses called by either party, Ms. Terry Smith, from the Catholic Board, testified for the respondent on this appeal.

Testimony of Ms. Terry Smith

[20] Ms. Smith is the Controller of Finance for the Catholic Board. She has been in this position since 2005.

[21] She is a Chartered Accountant, and before working for the Catholic Board, worked for 17 years at BDO Dunwoody Chartered Accountants in Peterborough as the manager responsible for audits, accounting and tax.

[22] At the Catholic Board, she was responsible for payroll, budget and accounting.

[23] She explained the procedure used by the Catholic Board in 2007 to retain occasional teachers. She stated that the Catholic Board used a service called "Apply to teach". The Human Resources Department prepared a list with the names of occasional teachers who were available to work. The list was referred to as the occasional list. The Board had an automated call-out system into which the occasional list was entered. If a regular teacher in a school was going to be absent and an occasional teacher required, then the regular teacher would call in to the automated call-out system. On a rotational basis, the system would call an occasional teacher. If the occasional teacher accepted the assignment, then he or she would be offered it. If not, the next occasional teacher on the list would be called and offered the assignment.

[24] She also explained that when occasional teachers are placed on the list, they set the geographic region that they are willing to work in. The Board has four regions and an occasional teacher is permitted to select one of more of the areas. The teachers can also select the days or times that they would like to work; for example, some occasional teachers will only work mornings.

[25] Ms. Smith indicated that occasional teachers are not required to have a driver's licence or to own or to use a vehicle while employed for the Catholic Board. In their advertising for occasional teachers, the Catholic Board has never imposed such requirements. Moreover, such requirements are not part of the occasional teachers' Collective Agreement.

[26] Ms. Smith stated that she became aware in 2006 that one of her employees in the accounting department was issuing T2200 forms to occasional teachers.

[27] She indicated that when she found this out, she questioned whether this was an appropriate practice. Her initial reaction was that it was not. Before making a decision, she read again the provisions of the Act, as well as the *Interpretation Bulletin* relating to motor vehicle travel expenses. She also discussed the issue with

the Human Resources Department to ensure that she understood the terms and working conditions governing the employment of the occasional teachers. She reviewed the Collective Agreement for occasional teachers. She also discussed the issue with the superintendent of the Board, who also is a Chartered Accountant. She also asked BDO Dunwoody to provide an opinion on whether a T2200 form should be issued to occasional teachers (see Exhibit A-27). As a result of her research and inquiries, she concluded that the form T2200 should not be issued to occasional teachers.

[28] The Board, under her instructions, stopped issuing the T2200 form to occasional teachers for the 2007 taxation year.

[29] Briefly put, she was of the view that the appellant did not meet the conditions of subparagraphs 8(1)(*h.1*), (i) and (ii).

[30] She stated that she did not believe that the appellant was required under his contract of employment to pay for his motor vehicle travel expenses. In her view, it was not an express condition of the appellant's contract of employment nor an implied condition.

[31] She also stated that the appellant was not required to travel for the Catholic Board. He was not required to travel from school to school. The travel from the appellant's residence to a school where he was working each day was, in her view, a personal expense.

Appellant's position

[32] The appellant is of the view that he meets the conditions of paragraph 8(1)(*h.1*).

[33] He stated that it was clear that he was working at different places during the week and common sense should prevail. In a week for example, he could work at numerous schools; he could be a different school each day. He needed a car in order to get to the school where he taught each day. He stated that he was advised on short notice where he was to be working and there were no other means of transportation.

[34] In the appellant's view, it was also clear that there was an implied condition under his contract of employment that he had to pay for his motor vehicle travel expenses in the performance of the duties of his employment.

[35] He also stated that occasional teachers had to make themselves available or otherwise provide a reasonable explanation for refusing an assignment. An occasional teacher who refused two assignments within a period of sixty working days would be removed from the occasional list, in other words would be fired (see Exhibit A-16, article 13.07 of the Collective Agreement).

[36] The appellant also stated that he did not claim his motor vehicle travel expenses when he was teaching in Peterborough since it was close to his residence. He was only claiming out - of- town expenses.

[37] The appellant argues *res judicata* and abuse of process. In his view, the respondent should be barred from arguing the present appeal in light of Justice McArthur's 2009 decision for the appellant's 2005 taxation year. In allowing his appeal for the 2005 taxation year with respect to the Catholic Board. Justice McArthur made the following findings:

a. the appellant had, as required by subsection 8(10), a form T2200 signed by a representative of the Catholic Board, although he was unable to get one from the Public Board;

b. the appellant met the criteria of paragraph 8(1)(*h.1*)(i); the employer's place of business was the Catholic Board in Peterborough;

c. the appellant had to travel to various schools. He had to travel from 10 to 60 kilometres from his home on short notice and required a car to do so. He had to maintain the car at his own expense. His car was a required tool of his trade. Other modes of transportation were either not available or not practical;

d. there was an implied contract between the appellant and his employer; the appellant had to pay for his motor vehicle travel expenses in the performance of his duties for the Board;

e. the appellant's deduction with respect to the Public Board stood on different ground since the appellant was not provided with a form T2200 by his employer.

[38] The appellant is of the view that the respondent has to apply the conclusions reached by Justice McArthur in respect of his 2007 taxation year, namely that:

i. the appellant had to travel to different schools;

ii. there was an implied condition in his contract of employment whereby he had to pay his own motor vehicle travel expenses, in the performance of his duties; and

iii. that his motor vehicle travel expenses were incurred for travelling in the course of his employment.

[39] The appellant states that not having a T2200 form from either the Catholic or Public Board should not disentitle him from being able to deduct his motor vehicle travel expenses. He states that the interpretation given to the terms of the Collective Agreement by Justice McArthur is the law and has priority over Ms. Smith's understanding of the Collective Agreement. In his view, in light of Justice McArthur's reasons, both the Catholic and the Public Boards were unreasonable in not providing him with a form T2200.

[40] The appellant argues that he falls within the exceptional circumstances referred to in the decision of *Brochu v. R*, 2010 TCC 274, where Justice Boyle, with respect to the T2200 form, stated at paragraph 11 of his reasons for judgment, that if there were exceptional circumstances a taxpayer could deduct his motor vehicle travel expenses without a T2200:

> [11] I would also note that the language of subsection 8(10) requires that a duly completed and signed T2200 form be filed, and that none was provided to Mr. Brochu. While it may be possible that in exceptional circumstances a paragraph 8(1)(*h.1*) claim could succeed if an employer unreasonably refused, or was unable, to complete and sign a T2200 form, this is clearly not such a case. An officer of Abitibi testified that Abitibi did not complete and sign such a form with respect to Mr. Brochu because it did not believe he met the requirements and because Abitibi had previously obtained a written opinion from the Canada Revenue Agency ("CRA") that it did not believe employees of Abitibi in circumstances such as those of Mr. Brochu qualified. This Court has reached the same conclusion. The absence of the T2200 form in this case requires that these appeals be dismissed.

[41] The appellant argued that since Justice McArthur found that his conditions of employment met the requirements of paragraph 8(1)(*h*.1) of the Act and since the evidence was that his conditions of employment had not changed, the respondent could not re-argue his conditions of employment. To support his position, the appellant referred to the decision of the Federal Court of Appeal in *742190 Ontario Inc. v. Canada (Customs & Revenue Agency),* 2010 FCA 162, where it was decided that the doctrine of *res judicata* applies to appeals under the Informal Procedure. At paragraph 44, Justice Sharlow for the Federal Court of Appeal wrote:

> [44] I agree with counsel for Van Del Manor on the meaning of section 18.28 of the *Tax Court of Canada Act*. To say that a judgment has no precedential value means that it does not state the law so as to be binding in a future case. A judgment may for any number of reasons have no precedential value, but even so it is binding on the parties and may prevent either party from attempting to relitigate an issue previously decided in the other party's favour on the same facts.

[42] He also argued that the Canada Revenue Agency (**CRA**) was unreasonable and to use his words from page 147 of the transcript "*well my thrust is that part of my argument for Canada and what makes this hearing different than others is that contrary to what I have been told all along, Canada Revenue could have demand that form from my employer, and my argument that Canada Revenue has been unreasonable in its treatment of me, simply out of hand denying my expenses because I don't have that form.*"

[43] In the appellant's view, CRA was unreasonable in not explaining to his employers in plain language the reasons for judgment of Justice McArthur. CRA was also unreasonable in failing to explain to his employers that they had to apply Justice McArthur's reasons. Therefore, it was unreasonable for CRA not to compel his employers to issue a T2200 form.

[44] He also stated that under subsection 220(2.1) of the Act, the Minister of National Revenue (**Minister**) could have waived the requirement to provide a prescribed form. He also relied on subsection 162.5 of the Act, to argue that a penalty should have been imposed on his employers for failing to provide him with the T2200 forms. In his view, his employers should have issued him the forms even if they were negative T2200s.

Respondent's Position

[45] The respondent started his argument by reminding the Court that although Justice McArthur allowed the appellant's appeal for the 2005 taxation year for the Catholic Board, his appeal was dismissed with respect to the Public Board, because the appellant did not have a T2200 from the Public Board.

[46] In the present appeal, the appellant does not have a T2200 form from either the Catholic or the Public Board. Section 8(10) of the Act is a condition precedent to a deduction under paragraph 8(1)(*h.1*) of the Act. The appellant cannot succeed if he

does not have positive T2200 forms or if he cannot prove exceptional circumstances for not having the forms.

[47] In response to the appellant's argument that the Boards and the CRA were unreasonable for not following Justice McArthur's decision, more particularly paragraph 10 of Justice McArthur's reasons where he stated:

> Presently, the Appellant does not seek to deduct trips, if any, to the school board offices, but only from home to school board-owned property. His employers' place of business included or was the two boards' Peterborough offices and not the individual schoolrooms that the Appellant attended from day-to-day. It is no stretch of reasoning to conclude that there was an implied contract between the Appellant and his employer that he had to travel to various schools by car, at his own expense, and obviously he received no travel allowance.

The respondent argued that in the absence of direct evidence from the Boards, Justice McArthur had no option but to read in an implied term into the contract of employment. The respondent also argued that it is a stretch for the appellant to state that the Boards and the CRA are not following the logic of Justice McArthur's decision when the logic was built on an absence of evidence.

[48] The respondent stated that Ms. Smith's evidence was forthright, clear, consistent and entirely credible. It was not the first time that she had to deal with the issuance of T2200 forms. Ms. Smith had considerable experience in dealing with tax issues. She understood the requirements for issuing a T2200 form. With respect to contracts of employment, she agreed that in some cases there may be implied working conditions. However, she did not believe that the appellant's collective agreement implied that he had to pay for his motor vehicle travel expenses.

[49] The respondent noted that Ms. Smith testified that in its advertisements for occasional teachers, the Catholic Board never required candidates to possess a driver's licence, to own a car or to have the use of a car. Occasional teachers were free to choose the geographic area that they worked in. In her view, the payment of the appellant's motor vehicle travel expenses was not an express condition or an implied condition of the collective agreement.

[50] The respondent argued that there was no evidence that the appellant's employment would have been in jeopardy or his progress as an occasional teacher impeded if he had simply signed on to work regions that were closer to his residence.

[51] In the respondent's view, if Justice McArthur had heard the evidence of Ms. Smith, he would have not come to the conclusion that he did.

[52] With respect to the doctrine of *res judicata*, the respondent referred to the decisions of *General Electric Canada Co*[1]. v. *R.*, 2011 TCC 564 and *McFadyen v. The Queen*, 2008 TCC 441.

[53] In particular, the respondent relied on paragraph 12 of the reasons of Justice Campbell, in *General Electric Canada Co.*, where she explained, by quoting the decision of the Supreme Court of Canada in *Angle v. Minister of National Revenue*, [1975] 2, S.C.R. 248, the distinction between cause of action and issue estoppel. He also relied on paragraph 11 of her reasons to argue that the doctrine of *res judicata* and abuse of process should only be applied at the Court's discretion.

[54] He relied on the decision of Chief Justice Rip, in *McFadyen* to argue that issue estoppel does not apply in this appeal, since the new evidence introduced by Ms. Smith at the hearing is conclusive of the matter. He quoted paragraph 38 of his reasons for judgment which reads:

> [38] The appellant submits that there is new evidence *viz.* a consent decision of the Ontario Superior Court that warrants a rehearing of this matter. With regards to new evidence, Donald J. Lange, *The Doctrine of Res Judicata in Canada*,[20] summarizes the special circumstance of new evidence nicely:
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> > ... Where fraud is not involved, the common law position with respect to new evidence is very clear. For new evidence to preclude the operation of issue estoppel or cause of action estoppel resulting from an entered judgment, the new evidence must be practically conclusive of the matter. The incontrovertible nature of the new evidence is at the heart of the test. It must be virtually impossible to controvert the new evidence.
> >
> > [Footnote omitted.]

[55] According to the respondent, Ms. Smith's evidence should be fully adopted to and, if it is, prevents the application of issue estoppel doctrine.

[56] The respondent argued that the present appeal is about subsection 8(10) of the Act. The appellant is not entitled to a deduction since the T2200 form is a condition precedent to the deduction. There are no exceptional circumstances that would allow

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1 This decision was appealed at the Federal Court of Appeal.

the Court to circumvent the condition precedent and allow the motor vehicle travel expenses without a T2200 form.

[57] The respondent argued that the evidence showed that Ms. Smith from the Catholic Board acted diligently. She made a rational decision based on the information she reviewed and her experience as a chartered accountant. She acted reasonably in concluding that the Board should not issue a T2200 form to the appellant.

[58] With respect to the Public Board, he argued that the reasons for not issuing a T2200 form were the same as for the Catholic Board. The documentary evidence showed that the Public Board acted reasonably in not providing the appellant with a T2200 form (see Exhibit A-13, A-14 and A-15).

[59] The respondent also submitted that the evidence of Ms Smith established both that the appellant did not meet subsection 8(10) of the Act, and that he did not meet at least two of the conditions under subparagraph 8(1)(*h.1*)(ii) of the Act. First, under his contract of employment, the appellant was not required to pay his motor vehicle travel expenses, and second, the expenses were not incurred by the appellant for travelling in the course of his employment. The respondent submitted that the travel between the appellant's residence and the school where he taught each day were personal expenses and therefore, not deductible. The respondent relied on the decision in *O'neil* v. *H.M.Q.* 2000 DTC 2409.

[60] Accordingly, the respondent argued that the appeal for the appellant's 2007 taxation year with respect to the motor vehicle travel expenses should be dismissed.

[61] With respect to the appellant's argument that the CRA was unreasonable for not imposing a penalty on his employers pursuant to subsection 162(5) of the Act and for not waiving the requirement with respect to the T2200 form pursuant to subsection 220(2.1) of the Act, the respondent stated that, in his view, the appellant did not understand the purposes of the provisions. CRA would not impose a penalty under subsection 162(5) of the Act on an employer for not issuing a negative T2200 form. He also argued that CRA cannot force an employer to issue a positive T2200 form. He pointed out that Ms. Smith would have issued a negative T2200 form to the appellant, but the appellant had only asked for it two days before the hearing. In addition, the respondent argued that a negative T2200 form would have not allowed the appellant to claim a deduction under paragraph 8(1)(*h.1*) of the Act. He also added that the Minister would not waive under subsection 220(2.1) of the Act the

requirement for a T2200 form, when the form is a condition precedent for a deduction.

Penalty under subsection 162(2) of the Act.

[62] The respondent stated that the appellant should be liable to pay a penalty under subsection 162(2).

[63] The appellant was of the view that the penalty should not apply since the demands made by the Minister to produce his income tax returns for the 2006 and 2007 taxation years were not served on him personally or by registered mail.

[64] The respondent argued that the appellant did not raise this issue during the evidence portion of the hearing; it was only raised by him during his argument. The respondent therefore argued that she did not have the opportunity to cross-examine the appellant on this issue. The respondent also stated that the appellant did not provide any evidence establishing that the demands made by the Minister were not served personally or by registered mail for his 2006 and 2007 taxation years.

[65] Furthermore, the respondent noted that the appellant had stated during his testimony that he had failed to file his returns on time because he was busy dealing with CRA trying to settle the T2200 issue. In the respondent's view, this was not a valid due diligence defence that would warrant not applying the penalties to the appellant.

Analysis

[66] Justice Campbell, in *General Electric Canada Co.*, succinctly summarized the distinction set out in the seminal case of *Angle v. Minister of National Revenue* between the doctrines of *res judicata* and abuse of process. She stated the following at paragraph 11 and 12 of her reasons for judgment :

> [11] To prevent the relitigation of a matter that has been previously before the Court, the doctrines of *res judicata* and abuse of process may be used. The abuse of process doctrine is focussed on the integrity of the adjudicative process as opposed to that of the parties. Like the doctrine of *res judicata*, abuse of process should only be applied at the Court's discretion.

> [12] The doctrine of *res judicata*, which provides finality to the litigation and fairness to the parties to the litigation, has two branches: cause of action estoppel and issue estoppel. In *Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.), Dickson J., at page 254, explained the distinction as follows:
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> > ... The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction. ... The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins J. of the High Court of Australia in *Hoystead v. Federal Commissioner of Taxation*, [(1921), 29 C.L.R. 537] at p. 561:
> >
> > > I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").

[67] The appellant argued that Justice McArthur had decided that he met the conditions of paragraph 8(1)(*h.1*), and that the respondent is therefore prevented from re-litigating his conditions of employment. The appellant also relied on *McFadyen*, where Chief Justice Rip elaborated on the scope of the issue estoppel doctrine at paragraph 25 of his reasons:

> Henderson not only forecloses the relitigation of issues that have been conclusively decided by a court of competent jurisdiction. It also enunciates what has been referred to as the "might or ought" principle[9] - matters that properly should have been part of the original litigation but that a party failed to argue cannot be raised in subsequent litigation.[10]
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> [Footnote omitted.]

[68] Accordingly, the appellant argued that the respondent should either have called a representative of the Catholic Board to serve as a witness during the hearing before Justice McArthur or appealed the judgment of Justice McArthur.

[69] The respondent on the other hand argued that she is not prevented from re-litigating in light of the new evidence given by Ms. Smith. Since her evidence was practically conclusive of the matter, the issue estoppel doctrine does not apply.

[70] I am of the view that the evidence given by Ms. Smith, to use the wording of *McFadyen*, is practically conclusive of the matter. Therefore, the doctrine of issue estoppel does not apply.

[71] The evidence of Ms. Smith was key to the issues under litigation. She testified that as an occasional teacher the appellant was not required under his Collective Agreement to pay his motor vehicle travel expenses. Occasional teachers did not need a driver's licence, a car or the usage of a car. They were able to choose the region or regions that they were prepared to work in. Their chances of promotions were not linked to how many regions they had chosen. Accordingly, there was no implied condition in the contract of employment requiring the appellant to pay for his motor vehicle travel expenses.

[72] In addition, the appellant's motor vehicle travel expenses were not incurred by him for traveling in the course of his employment. The appellant was driving from his residence to the school where he was assigned to teach. While he did not have a school where he usually reported, he did not have an office at the Boards. He was not required to go to the Catholic or the Public Boards before heading to the school where he was assigned. The appellant's place of employment was the school where he was assigned to teach either for one day or for more than one day.

[73] In *O'Neil v. H.M.Q*, 2000 DTC 2409[2], Mr. O'Neil worked for the City of Ottawa. He was required to have a car and to travel from City Hall to different municipal sites and between municipal sites to perform his duties for the City. He was reimbursed by the City for such travelling. Mr. O'Neil claimed as a deduction under paragraph 8(1)(*h.1*) of the Act his expenses for travel between his home and City Hall and from his home to different municipal sites. Those expenses were not reimbursed by the City of Ottawa. Chief Justice Rip decided that Mr. O'Neil was not entitled to claim his motor vehicle travel expenses to travel between his home and City Hall. He stated at paragraphs 24 and 25 that when Mr. O'Neil was travelling from his residence to City Hall he was not travelling in the course of his employment:

> [24] The word "course" is defined by Oxford as the "[h]abitual or ordinary manner of procedure;...". The phrase "...travelling in the course of ... employment" has been dealt with in *Luks v. Minister of National Revenue* ,16 and *Chrapko* .17 In *Luks* , it was held that a person could not be deemed to be "travelling in the course of the office or employment..." unless the travel actually involved the performance of some service as compared to simply getting oneself

[2] The decision in O'Neil was confirmed by the Federal Court of Appeal in *Hogg v. Canada*, [2002] F.C.J. No. 704.

> to the place of work. The Federal Court Trial Division in *Chrapko* , held that words "in the course of his employment" do not preclude a deduction in such circumstances. However, in appeal, the Federal Court of Appeal appeared to recognize that a taxpayer may deduct expenses for travelling from his home to a place of work if that place of work is not the place to which he "usually" reports to work. In assessing Mr. O'Neil, the tax authority accepted the principle that the appellant may deduct his automobile expenses for travel between his home and a work site that was not City Hall.
>
> [25] Mr. O'Neil's costs of travel between his home and City Hall are not deductible

[74] The appellant relied on the decisions in *Chapman v. H.M.Q*, 2002 TCC 617, *Healy v. H.M.Q.*, 79 D.T.C. 5060 and *Chrapko v. M.N.R*, 84 DTC 6544 in support of his argument that he had met the requirements under paragraph *8(1)(h.1)* of the Act.

[75] Each of these cases is distinguishable on the facts. Chapman was a consultant and the issue before the Court was whether his travel expenses were incurred for the purposes of earning income. Justice Woods noted that the facts in Chapman were different from the circumstances discussed in the employment cases. Chapman involved business expenses not employment expenses and different principles applied. In *Healy*, the question that the Federal Court of Appeal had to decide was whether Mr. Healy could deduct his meals pursuant to subsection 8(4). The question turned on where the employer's establishment to which Mr. Healy ordinarily reported was located. Justice Urie for the Court of Appeal decided that it was in Toronto. Mr. Healy was allowed to deduct his expenses related to his meals while he was working in Fort Erie. In *Chrapko*, Mr. Chrapko had to report to a place where he did not usually report for work purposes. In my view, these decisions do not support the appellant's position.

[76] More importantly, the Catholic Board and the Public Board did not provide the appellant with a T2200 form certifying that he met the conditions of paragraph *8(1)(h.1)* of the Act. Obtaining a T2200 form is a condition precedent for the appellant to be entitled to deduct his motor vehicle travel expenses.[3] The appellant has not established that either the Catholic Board or the Public Board acted unreasonably or in bad faith in not providing him with a T2200 form.

[77] On the contrary, the evidence showed that Ms. Smith made a decision based on the information she reviewed and on her professional training as a Chartered Accountant. She took numerous steps before making a decision not to issue a T2200.

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[3] See. *Schnurr v. H.M.Q.*, 2004 D.T.C. 3531 at paragraph 19.

She looked at the provisions of the Act and the IT-Bulletin relating to motor vehicle travel expenses. She also consulted the Human Resource Section of the Board to ensure that she understood the collective agreement, and with the Board superintendant. She also sought the advice of the accounting firm BDO Dunwoody. She acted diligently.

[78] Coming back to the issue of the doctrine of *res judicata*, it is in my view, difficult to apply this doctrine to tax appeals that do not deal with the same taxation year. In tax appeals what is subject to being appealed is the Minister's assessment, not the reasons for the assessment. Justice Christie explored this question in *Hagedorn v. Canada*, [1993] T.C.J. No. 727 (T.C.C.) at paragraph 6:

> 6 When the appellant appealed the reassessment of October 16, 1989, to this Court regarding his 1988 taxation year, what was subject to being appealed has been described by judicial authority in different words but, in my opinion, the substance of the language employed is the same. What is open on an appeal to this Court is the result of an assessment, not the process or reasoning by which it was arrived at. In *Vineland Quarries and Crushed Stone Ltd. v. Minister of National Revenue*, [1970] C.T.C. 12, 70 D.T.C. 6043 (Ex. Ct.), Cattanach, J. said at pages 15–16 (D.T.C. 6045):
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> > As I understand the basis of an appeal from an assessment by the Minister, it is an appeal against the amount of the assessment.
> >
> > In *Harris v. Minister of National Revenue*, [1964] C.T.C. 562, 64 D.T.C. 5332 (Ex. Ct.), my brother Thurlow said at page 571 (D.T.C. 5337):
> >
> > > On a taxpayer's appeal to the Court the matter for determination is basically whether the assessment is too high. This may depend on what deductions are allowable in computing income and what are not but as I see it the determination of these questions is involved only for the purpose of reaching a conclusion on the basic question. ...
>
> In *Midwest Oil Production Ltd. v. The Queen*, [1982] C.T.C. 107, 82 D.T.C. 6092 (F.C.T.D.), Mr. Justice Mahoney said at page 110 (D.T.C. 6094–95): "It is to be emphasized that it is the Minister's assessment, not his reasons for it, that is the subject matter of the appeal." On appeal to the Federal Court of Appeal ([1983] C.T.C. 338, 83 D.T.C. 5304 at page 338 (D.T.C. 5304)), Mr. Justice Ryan speaking for the Court said: "I agree with the reasons for judgment of the learned trial judge and, accordingly, I would dismiss the appeal with costs." Leave to appeal to the Supreme Court of Canada was refused on November 24, 1983: [1983] 2 S.C.R. x, 52 N.R.

[79] Each taxation year is a different cause of action since what is in litigation is whether the Minister has correctly assessed the amount owed by a taxpayer for the year in conformity with the Act. This is why in *Merrins v. R*, 2006 D.T.C. 3216, Justice Paris heard the same issues that had been raised in two previous appeals of Mr. Merrins. He stated the following in paragraphs 8 and 9:

> 8 The Appellant raised these same issues in two previous appeals to this Court, first by in respect of his 1998 taxation year2 and then in respect of his 2000 and 2001 taxation years3. Both of these appeals were dismissed. The Appellant appealed the judgment in *Merrins* #1 to the Federal Court of Appeal. That appeal was also dismissed4. The Appellant has also filed an appeal from the judgment in *Merrins* #2 which is presently pending in the F.C.A.
>
> 9 There are no material differences between the facts as they relate to the Appellant's 2002 and 2003 taxation years and the facts upon which the earlier appeals were decided. The Appellant's sources of income were the same in all of the years, and the reassessment of the Appellant's tax was made in the same manner for each year, as set out below. However, given that these appeals involve separate taxation years, an independent review of the facts and issues is required.
>
> [Footnote omitted.]

[80] In my view, since in income tax appeals we often deal with recurring issues, this reasoning gives a taxpayer who lost an appeal in one taxation year, a second chance of coming to this Court and arguing the same issue in another taxation year. A taxpayer would be able to bring evidence that he had failed to file in the hearing for the previous taxation year. This is also true for the respondent who should not be prevented from challenging a taxpayer's claim for a deduction simply because the deduction had previously been allowed if the evidence now showed that the taxpayer was not entitled to the deduction under the Act. In my view, as it was decided in *General Electric Canada Co.*, either party could in a new taxation year introduce new evidence or argue a different position in law.

[81] It is important to note, that in the decisions of *McFadyen* and *742190 Ontario Inc.*, the doctrine of *res judicata* was applied to appeals dealing with the same taxation years.

[82] With respect to the doctrine of abuse of process, I am of the view that it does not apply in this appeal. I am not dealing with a procedure that "would bring the administration of justice into disrepute".

Subsections 162(5) and 220(2.1) of the Act

[83] I am of the view that subsections 162(5) and 220(2.1) of the Act do not have the application put forward by the appellant. In any event, I do not have the jurisdiction to compel a Minister to apply a penalty under subsection 162(5) of the Act to his employers. The same is true for subsection 220(2.1) of the Act. I cannot compel the Minister to waive the requirement for the T2200 form nor can I compel the Minister to force an employer to issue a T2200 form. I have difficulty understanding the position of the appellant when he stated that if his employers had issued him a negative T2200 he might have been in a better position to argue his appeal. A negative T2200 form would not have established that he met the requirements of the Act.

Penalty for repeated failure to file.

[84] The appellant states that the demands by the Minister to file his 2006 and 2007 taxation years were not served on him personally or by registered letter. I have no reason to question his credibility on this issue. In *Taylor v. H.M.Q.*, 1994 2 C.T.C 2230, where the respondent had not proven that she had complied with the requirements of subsection 150(2) of the Act, Justice Sarchuk, stated at paragraph 11 of his reasons for judgment:

> 11 The evidence given by the appellant with respect to her knowledge of and receipt of documents from Revenue Canada was vague and frankly less than persuasive. Nonetheless I cannot on the evidence conclude that the provisions of subsection 150(2) have been complied with by the Minister. Thus, the appellant is entitled to relief in part.

[85] The same is true in this appeal, the respondent did not file any evidence to establish that the requirements of subsection 150 (2) of the Act were met.

[86] Therefore, the appeal will be allowed with respect to the penalties assessed under subsection 162(2) of the Act for the appellant's 2007 taxation year. The appeal will be dismissed with respect to the motor vehicle travel expenses claimed by the appellant for his 2007 taxation year. Without costs.

Signed at Ottawa, Canada, this 5th day of July 2012.

"Johanne D'Auray"

D'Auray J.

CITATION:	2012 TCC 238
COURT FILE NO.:	2011-524(IT)I
STYLE OF CAUSE:	VICTOR G.E. KREUZ v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 15, 2012
REASONS FOR JUDGMENT BY:	The Honourable Justice Johanne D'Auray
DATE OF JUDGMENT:	July 5, 2012

APPEARANCES:

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