Docket: 2017-1804(IT)I

BETWEEN:

MICHAEL G. MCCARTHY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 12, 2018 and January 18, 2019, at Moncton, New Brunswick

Before: The Honourable Justice B. Russell

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Rhoda Lemphers

JUDGMENT

The appeal of the three reassessments raised July 2, 2017 under the federal *Income Tax Act* in respect of the Appellant's 2011, 2012 and 2013 taxation years is allowed with costs of $600 to the Appellant, and the said reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the following bases:

a) in accordance with the terms set out in the Consent to Judgment in Part, signed on behalf of each of the parties herein, a true copy of which Consent is affixed to this Judgment; and

b) T4'd income of the Appellant in the amounts of $26,626.01 for the 2011 taxation year, $37,492.08 for the 2012 taxation year and $35,569.63 for the 2013 taxation year is reportable as income pursuant to paragraph 56(1)(v) of

the federal *Income Tax Act*, and thus is deductible pursuant to subpara. 110(1)(f)(ii) of that Act.

Signed at Ottawa, Canada, this 29th day of March 2019.

"B. Russell"

Russell J.

Citation: 2019TCC69
Date: 20190405
Docket: 2017-1804(IT)I

BETWEEN:

MICHAEL G. MCCARTHY,

Appellant,

and

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Respondent.

AMENDED REASONS FOR JUDGMENT

Russell J.

Introduction:

[1] The Appellant, Michael McCarthy, appeals electing the informal procedure three reassessments raised July 2, 2017 by the Minister of National Revenue (Minister) under the federal *Income Tax Act* (Act). These reassessments pertain to the Appellant's 2011, 2012 and 2013 taxation years respectively. In the Notice of Appeal two issues are raised - the Minister's denied deduction of certain claimed business expenses and capital cost allowance for each of those years and the Minister's denied deduction of compensation payments as claimed by the Appellant.

[2] The first of these issues, deduction of claimed business expenses and capital cost allowance, has been addressed in a "Consent to Judgment in Part" signed by both parties pertaining to that issue, filed with the Court shortly after the January 18, 2019 continuation of the hearing. I return to this at the close of these reasons for judgment. The second matter, regarding denial of deduction of claimed compensation payments, is the matter principally addressed herein.

Evidence:

[3] Pertinent facts established in evidence are here summarized. At all relevant times the Appellant was employed by the federal government (Employer) as a

correctional officer working at a federal penitentiary in New Brunswick. That employment was subject to a collective agreement between the federal Treasury Board and the Appellant's union, being the Union of Canadian Correctional Officers (Collective Agreement).

[4] Article 30.15 of the Collective Agreement, under the heading "Injury-on-duty leave", provides:

> An employee shall be granted injury-on-duty leave with pay for such reasonable period as may be determined by the [e]mployer when a claim has been made pursuant to the Government Employees' [*sic*] Compensation Act, and a Workers' Compensation authority has notified the [e]mployer that it has certified that the employee is unable to work because of[...] (a.) personal injury accidentally received in the performance of his or her duties and not caused by the employee's wilful misconduct[...]

[5] In February 2011 the Appellant was accidentally injured while engaged in his employment duties. Pursuant to the Collective Agreement he requested and was granted paid sick leave, utilizing accumulated sick leave credits, and he made a compensation claim to New Brunswick's workers' compensation board, called WorkSafeNB. In April 2011 WorkSafeNB certified that the on-duty injury had left the Appellant unable to work, and accordingly approved his compensation claim.

[6] Following this WorkSafeNB approval, the Employer granted the Appellant "injury-on-duty leave". Upon commencing this leave, the sick leave credits the Appellant had claimed and used following his injury including for the initial three days following occurrence of the injury, were restored to him. These steps are both consistent with provisions in the Collective Agreement and **procedures** of WorkSafeNB.

[7] The Appellant remained on injury-on-duty leave for the ensuing three years (being the years in issue), during which the Employer paid him income equivalent in quantum to his full salary as a correctional officer.

[8] The Employer issued the Appellant a T4 for each of the three subject taxation years. Each year's T4 specified an amount equivalent to the Appellant's full salary paid for that taxation year.

Issue:

[9] The Appellant's position is that 85% of the Employer's payments totalling his full salary, received while he was on injury-on-duty leave, constituted worker's compensation and hence were reportable per para. 56(1)(v) of the Act, and wholly deductible per subpara. 110(1)(f)(ii) of the Act. Those three claimed 85% amounts are $26,626.01 (2011), $37,492.08 (2012) and $35,569.63 (2013).

[10] That is the issue. Were the subject payments reportable pursuant to sections 3 and 5 of the Act all as regular salary income or does 85% of each of these payments constitute income per para. 56(1)(v) which renders reportable:

> compensation received under an employees' or workers' compensation law of Canada or a province in respect of an injury, a disability or death.

Analysis:

[11] Compensation payments reportable under para. 56(1)(v) are eligible for a wholly offsetting deduction per subpara. 110(1)(f)(ii) of the Act. That latter provision reads:

> For the purpose of computing the taxable income of a taxpayer for a taxation year, there may be deducted such of the following expenses as are applicable...(f)...any amount that is (ii) compensation received under an employees' or workers' compensation law of Canada or a province in respect of whose injury, disability or death the compensation was paid.

[12] I perceive this offset provision to be reflective of the general principle that damages won and paid for personal injury are not taxable. In the case of federal government employees the *Crown Liability and Proceedings Act*, R.S.C. 1985, c C-50, as amended, provides at section 9, in relevant part, that:

> No proceedings lie against the Crown … in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund … in respect of the … injury, damage or loss in respect of which the claim is made.

[13] **Accordingly** the Appellant is unable to sue his employer the federal Crown for damages for personal injury (which would be non-taxable) where compensation for that injury is payable out of the federal Consolidated Revenue Fund. Thus it is only fitting that such compensation would itself be non-taxable.

[14] The Appellant cites statements in the Canada Revenue Agency (CRA) Interpretation Bulletin IT-202R2, entitled "Employees' or workers'

compensation", issued September 19, 1985. CRA has since "archived" IT-202R2. Of course CRA interpretation bulletins do not have force of law, as stated on the face of all such bulletins. The statements particularly relied upon are from para. 1(b) and para. 4 of this interpretation bulletin as follow:

> 1(b). In this bulletin 'compensation' refers to the amount of an award , as adjudicated by a compensation board...and includes any such compensation to which entitlement is provided under the Government Employees' Compensation Act…
>
> [and]
>
> 4. ...An employee may, under the terms of an employment contract or collective agreement, or by reason of having been granted injury leave with pay under the Financial Administration Act, be entitled to receive salary or wages during a period in which he employee is also entitled to compensation. Where, in these circumstances, the employer receives no payment from a compensation board, the amount received from his or her employer, to the extent that it does not exceed the compensation amount, will be included in the employee's income for the year, as compensation, under paragraph 56(1)(v). The excess, if any, will be included in the employees' income under subsection 5(1).

[15] The Respondent cites certain jurisprudence in opposing the Appellant's position that the subject amounts are reportable under para. 56(1)(v) of the Act and are accordingly deductible under per subpara. 110(1)(f)(ii) of the Act. Of course, **subject to the doctrine of *stare decisis*, the *ratio decidendi* of jurisprudence** does have force of law, unlike CRA interpretation bulletins whether archived or not.

[16] In *R v. Whitney*, 2002 FCA 266, the Federal Court of Appeal (FCA) considered whether compensation received by a New Brunswick government employee, while unable to work by reason of a work-related injury, came within the ambits of the aforementioned para. 56(1)(v) and subpara. 110(1)(f)(ii). In allowing the appeal, the FCA recognized as key to this question whether the subject compensation payments had been (**as these** statutory provisions identically provide), "received under an employees' or workers' compensation law…".

[17] The FCA ascertained that the pertinent amounts had <u>not</u> been paid "under" any compensation statute. In this matter, the New Brunswick workers' compensation board's disability certification process had been incorporated into the collective agreement between the taxpayer's union and the provincial government employer, simply upon agreement of those two parties, but absent any

statutory basis for so doing, including in the province's *Workers' Compensation Act*, R.S.N.B. 1973, c. W-13 as amended (*NBWCA*). Thus in this matter the FCA found the involvement of the province's workers' compensation board and adoption of that board's disability certification process to have been "extra-statutory". The authority for payment of the subject amounts was not statutory. Rather, the authority for payment was solely the terms of the collective agreement.

[18] In *Whitney* also the FCA noted that the *NBWCA* specified that compensation could not be paid unless there had been at least a three day interruption of earnings; and that had not happened. Also noted was that the taxpayer had been paid 100% of her regular pay; not simply 85% of regular pay, as also the *NBWCA* provided. These further reasons buttressed the FCA conclusion that the *NBWCA* compensation scheme had not been followed.

[19] Addressing interpretation bulletin IT-202R2, the FCA wrote:

> …the [Income Tax] Act itself reflects no..ambiguity and [IT-202R2], being a non-statutory document, cannot create an ambiguity where none exists in the relevant provisions of the [Income Tax] Act.

[20] Shortly after, a different FCA panel decided *Suchon v. R.*, 2002 FCA 282. In that matter Mr. Suchon had, as an IBM employee, incurred injuries at an IBM event that confined him to a wheelchair. Over time he could no longer function as an employee, and so was placed on IBM's disability program and received an income thereunder. He argued that para. 56(1)(v) and subpara. 110(1)(f)(ii) of the Act should apply to that income. In denying this appeal, Sharlow, JA wrote (para. 18):

> [This] Court held [in *Whitney*] that an amount is not within the scope of paragraph 56(1)(v) and subparagraph 110(1)(f)(ii) unless it is paid in accordance with a worker's compensation law. A payment made under a contractual arrangement, even one that includes an extra-statutory adjudication by a workers' compensation board or commission, is outside the scope of these provisions. To the extent that IT-202R2 is inconsistent with this interpretation it is wrong in law.

[21] The Respondent cited also a 2014 decision of the Supreme Court of Canada - *Martin v. Alberta Workers' Compensation Board*, 2014 SCC 25. The appellant, Mr. Martin, was a federal government employee based in Alberta. He had initiated a claim for workers' compensation based on a perceived injury (employer induced stress) at his workplace, resulting in him taking compensated time off work. Alberta's workers' compensation board denied Mr. Martin's claim, based on a

provincial policy. A preliminary question was whether provincial policy should or could be used to determine a federal employee's compensation claim.

[22] In this regard section 4 of the federal *Government Employees Compensation Act*, R.S.C. 1985, c. G-5 as amended (*GECA*) was prominently referenced. (Of course, the *GECA* was not pertinent in either of the above cited FCA cases, as neither involved a federal government employee.) Subsections 4(1), 4(2), 4(3) and 4(6) of the *GECA* provide:

> 4. [Persons eligible for compensation] (1) Subject to this Act, compensation shall be paid to
>
> (a) an employee who
>
> (i) is caused personal injury by an accident arising out of and in the course of his employment, or
>
> (ii) is disabled by reason of an industrial disease due to the nature of the employment; and
>
> (b) the dependants of an employee whose death results from such an accident or industrial disease.
>
> (2) [Rate of compensation and conditions] The employee of the defendants referred to in subsection (1) are, notwithstanding the nature or class of the employment, entitled to receive compensation at the same rate and under the same conditions as are provided in the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen, employed by person other than Her Majesty, who
>
> (a) are caused personal injuries in that province by accidents arising out of and in the course of their employment; or
>
> (b) are disabled in that province by reason of industrial diseases due to the nature of their employment.
>
> (3) [Determination of compensation] Compensation under subsection (1) shall be determined by
>
> (a) the same board, officers or authority as is or are established by the laws of the province for determining compensation for workmen and dependants of deceased workmen employed by persons other than Her Majesty; or
>
> (b) such other board, officers or authority, or such court, as the Governor in Council may direct.

> (6) [Compensation, etc., payable out of C.R.F.] There may be paid out of the Consolidated Revenue Fund,
>
> > (a) any compensation or costs awarded under this Act;
> >
> > (b) to the board, officers, authority or court authorized by the law of any province or under this Act to determine compensation cases, such amount as an accountable advance in respect of compensation or costs that may be awarded under this Act as, in the opinion of the Treasury Board, is expedient;
> >
> > (c) in any province where the general expenses of maintaining the board, officers, authority or court are paid by the province or by contributions from employers, or by both, such portion of the contributions as, in the opinion of the Treasury Board, is fair and reasonable;
> >
> > (d) in any province where the board, officers or authority may make expenditures to aid in getting injured workmen back to work or removing any handicap resulting from their injuries, such portion of those expenditures as, in the opinion of the Treasury Board, is fair and reasonable; and
> >
> > (e) to the board, officers, authority or court, such amount as an accountable advance in respect of any expenses or expenditures that may be paid under paragraph (c) or (d) as, in the opinion of the Treasury Board, is expedient.

[23] In *Martin* the Supreme Court affirmed that under the *GECA*, provincial legislation and policies were applicable to a federal employee for workers' compensation purposes. The language of the *GECA* was clear, and by logical extension the applicable provincial law and policies applied as well to the threshold matter of eligibility (*Martin*, paras. 20 – 28).

[24] Thus I find that the compensation received by the Appellant in this appeal, in the amount of 85% of his full salary whilst on injured-on-duty leave, constituted compensation, "received under an employees' or workers' compensation law…", being the language in the Act common to para. 56(1)(v) and subpara. 110(1)(f)(ii). The pertinent workers' compensation law here is the federal *GECA*, establishing the right to compensation and incorporating by reference and delegating to WorkSafeNB relevant matters including determination of eligibility and quantum. In respect of quantum, it is noted that subsection 38.11(2) of the *NBWCA* limits compensation to a maximum of 85% of earnings.

[25] In the present case, the legislated procedure, complete with policies, is centrally referenced in the Collective Agreement applicable to the Appellant. The Collective Agreement references to the role and functions of WorkSafeNB are not ex-statutory as in *Whitney*. They are legislatively provided for by the *GECA*, including particularly in section 4 thereof.

[26] In this matter the compensation, being 85% of the Appellant's pay, was paid to the Appellant by the federal government (being a self-insurer) rather than by WorkSafeNB. This is legislatively sanctioned by para. 4(6)(a) of the *GECA*, set out above, which authorizes the federal government employer to pay out of the federal Consolidated Revenue Fund, "any compensation…awarded under this Act." Compensation awarded by the applicable provincial workers' compensation process, being a process that the *GECA* has incorporated by reference, accordingly has been "awarded under this Act"; *i.e.*, under the *GECA*.

[27] The Respondent argues that more than 85% of earnings was paid to the Appellant. He received 100% of his regular pay. However, that is not a problem. Simply**,** 85% of the 100% of his regular pay that he received constituted compensation as determined by the workers' compensation process of New Brunswick. The fact that he received also the remaining 15% of his regular pay does nothing to alter that the first 85% was compensation under the *GECA*.

[28] The Respondent submits also that the subject payments were not made under the *GECA* as the procedure per the ***NBWCA* was** not followed insofar as subsection 38.11(3) of that latter statute requires a minimum 3-day interruption of remuneration and benefits. The Respondent argues that this provision was not observed, as sick days were used for the three days that were later converted into paid injury-on-duty leave; thus the Appellant had no interruption of earnings.

[29] However, as the Appellant has noted, subsection 38.11(7) of the *NBWCA* renders non-applicable the subsection 38.11(3) three day provision where the disability from injury continues for more than twenty working days, as manifestly was the case here. The pertinent wording of subsection 38.11(7) is:

> Where a worker is disabled as a result of an injury...for more than twenty working days, the Commission shall pay compensation to the worker in respect of the period of timed referred to in subsection (3)...

[30] On the basis of the foregoing I find in favour of the Appellant's claim that 85% of his regular pay received during the subject taxation years while the

Appellant was on injury-on-duty leave constituted income per para. 56(1)(v) of the Act and thus was deductible per subpara. 110(1)(f)(ii) of the Act.

[31] Returning to the first issue, regarding denied business deductions and capital cost allowance, and for which issue a "Consent to Judgment in **Part" was** filed, I accept the terms of the said Consent as reflected in my judgment concurrently issued and in accordance with these reasons for judgment.

[32] Also, I grant the Appellant costs in this informal procedure matter, fixed at $600.

This Amended Reasons for Judgment is issued in substitution for the Reasons for Judgment dated March 29, 2019.

Signed at Ottawa, Canada, this 5th day of April 2019.

"B. Russell"

Russell J.

CITATION:	2019TCC69
COURT FILE NO.:	2017-1804(IT)I
STYLE OF CAUSE:	MICHAEL G. MCCARTHY AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Moncton, New Brunswick
DATE OF HEARING:	September 12, 2018 January 18, 2019
REASONS FOR JUDGMENT BY:	The Honourable Justice B. Russell
DATE OF JUDGMENT:	March 29, 2019
DATE OF AMENDED REASONS FOR JUDGMENT:	April 5, 2019

APPEARANCES:

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COUNSEL OF RECORD:

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