Docket: 2021-1679(IT)I

BETWEEN:

JEAN-MARIE ROBILLARD,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on May 30, 2024 at Montréal, Québec
and reasons for Judgment delivered orally by teleconference
on June 17, 2024 at Ottawa, Ontario

Before: The Honourable Justice Guy R. Smith

Appearances:

For the Appellant:	Richard Venor
Counsel for the Respondent:	Simon Dufour

JUDGMENT

In accordance with the Reasons for Judgment delivered orally by teleconference held on June 17, 2024, the appeal from a reassessment made under the *Income Tax Act* in respect of the 2016 and 2017 taxation years, is hereby allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to a deduction for the amounts paid to Fernand Doucet for both the 2016 and 2017 taxation years. There shall be no order as to costs.

Signed at Ottawa, Ontario, this 17th day of June 2024.

"Guy R. Smith"

Smith J.

Citation:2024 TCC 90
Date:20240617
Docket: 2021-1679(IT)I

BETWEEN:

JEAN-MARIE ROBILLARD,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

TRANSCRIPT OF THE REASONS FOR JUDGMENT

Smith J.

I – **Overview**

[1] I will now deliver my reasons for judgment in this matter.

[2] Jean-Marie Robillard, the Appellant in this proceeding, appeals from a reassessment made under the *Income Tax Act (*"Act") in respect of the 2016 and 2017 taxation years, denying certain employment expenses.

[3] The Appellant claimed expenses pursuant to paragraph 8(1)(f) of the Act that allows a commissioned employee to deduct expenses if they were required by the employment contract for the purpose of earning commission income. The Minister of National Revenue allowed motor vehicle expenses but denied expenses of $25,748 and $24,559 for the 2016 and 2017 taxation years, respectively.

[4] The Minister relied on a number of assumptions of fact that I will summarize as follows:

a) The Appellant owned 49% of the shares of a company known as Entreprises Larry Chauffage Gaz Naturel Inc. He was also an officer and director of this company as well as an employee;

b) For the 2016 taxation year, the Appellant reported total employment income of $80,110 including $32,500 as commission income;

c) For the 2017 taxation year, the Appellant reported total employment income of $90,516 including $35,500 as commission income;

d) From the employment expenses claimed by the Appellant, the sum of $20,000 alleged to have been paid to Liette Robillard for each of the 2016 and 2017 taxation years, was not incurred by the Appellant. And further, the sums of $5,748 and $4,599 alleged to have been paid to Fernand Doucet for the 2016 and 2017 taxation years, respectively, were not incurred by the Appellant;

e) The Appellant did not have a contract with either these individuals;

f) The Appellant did not submit any other details and documents that clearly demonstrate that he paid commissions (or salaries) to Liette Robillard and Fernand Doucet, or that a working relationship existed between them, such as: proof of payments, tasks description, timesheets, employee log book, T4 slips, etc.

II - Burden of Proof in Tax Matters

[5] I have set out these factual assumptions because of the nature of tax litigation and the burden of proof as explained by the Supreme Court of Canada in *Hickson Motors Ltd. v. Canada*, 1997 2 S.C.R. 336 ("*Hickson Motors*"). Those principles were later summarized by the Federal Court of Appeal in *House v. Canada*, 2011 FCA 234 ("*House v. Canada*") as follows:

1. The burden of proof in taxation cases is that of the balance of probabilities.

2. With regard to the assumptions on which the Minister relies for the assessment, the taxpayer has the initial onus to "demolish" the assumptions.

3. The taxpayer will have met his initial onus when he or she makes a *prima facie* case.

4. Once the taxpayer has established a *prima facie* case, the burden then shifts to the Minister, who must rebut the taxpayer's *prima facie* case by proving, on a balance of probabilities, his assumptions;

5. If the Minister fails to adduce satisfactory evidence, the taxpayer will succeed.

[6] The Federal Court of Appeal then indicated that "a prima facie case is one that is supported by evidence which raises such a degree of probability in its favour that it must be accepted if believed by the Court unless it is rebutted or the contrary is proved." In the end, whether a taxpayer is able to rebut the Minister's assumptions and establish a degree of probability in his or her favour will often depend on the Court's finding of credibility. The Court must ask itself if the taxpayer has adduced credible testimonial and documentary evidence to establish on a balance of probabilities that the Minister's assumptions are incorrect in law and in fact.

[7] I will add that the onus on the taxpayer does not shift to the Minister unless the taxpayer has established a *prima facie* case. If the taxpayer has not done so, the onus does not shift to the Crown, nor is there any obligation on the Minister to adduce contrary evidence or what the Appellant has referred to as a *contrepreuve.*

III – Motion to Strike

[8] To provide some context, I will start by reviewing the Respondent's preliminary motion to strike certain paragraphs of the Notice of Appeal. The motion was granted because the Court agreed that many paragraphs raised issues of CRA conduct as a basis for requesting that the reassessment should be quashed.

[9] As noted at the hearing, the case law has repeatedly held that CRA conduct is not relevant to the validity of an assessment made under the Act. In *Main Rehabilitation Co. Ltd, v.* The Queen, 2004 FCA 403, the Federal Court of Appeal held that the Tax Court of Canada does not have the jurisdiction to set aside an assessment on the basis of any abuse of process at common law or in breach of the Charter – and this is because the issue in an appeal is the validity of the assessment and not the process by which it was established. Put another way, the question is not whether CRA officials exercised their powers properly, but whether the amounts assessed can be shown to be properly owing under the Act.

[10] Similarly, in *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250, the Federal Court of Appeal stated at paragraph 83 that the Tax Court of Canada "does not have jurisdiction on an appeal to set aside an assessment on the basis of reprehensible conduct by the Minister leading up to the assessment, such as abuse of power or unfairness" and further "if an assessment is correct on the facts and the law, the taxpayer is liable for the tax."

[11] In this instance, I was not able to discern any conduct on the part of CRA officials that could be characterized as reprehensible. Requesting documentation in the context of an audit is not improper and is in fact the level of due diligence that would be expected of officials who are charged with the administration of the Act.

[12] Having concluded that CRA conduct is not relevant to the validity of an assessment, I will nonetheless address two objections made by the Appellant.

IV - Appellant's Obligation to Provide Supporting Documentation

[13] The first objection raised by the agent for the Appellant is that he had no obligation to produce any documentation pursuant to sections 231.1 and 231.2 of the Act.

[14] Although the evidence suggests that he did produce some documentation, including a form T2200, joint bank account statements as well as an invoice and receipt from Fernand Doucet, the Appellant thereafter took the position that there was no obligation to provide any further documentation.

[15] The Appellant relied on *Duma Construction Company Limited vs HMTQ*, a 1974 decision of the Alberta District Court. It was argued that this decision supports the proposition that a taxpayer has no legal obligation to provide any documentation to the Minister. The obligation is only to ensure it is available for inspection.

[16] I note that the decision in question involved the Minister's power to compel the production of documents by a third party pursuant to subsections 231(3) and 238(2) of the Act, as they existed at that time. That case involved a criminal prosecution.

[17] The difficulty is that this appeal does not involve a criminal prosecution of a third party. It is a civil matter and involves a reassessment of the Appellant's tax returns.

[18] As a general proposition, it is important to appreciate that the consequences flowing from a taxpayer's refusal to provide further supporting documentation for amounts claimed in a tax return, is that the reassessment will likely be confirmed by the Minister, as was done in this instance, leading to this appeal.

[19] Furthermore, a taxpayer's refusal to provide documents during the audit stage does not obviate the necessity of doing so at the hearing of the appeal where the taxpayer has the burden of establishing a *prima facie* case and demolishing the Minister's assumptions as established in *Hickson Motors,* cited above.

[20] I conclude that this position has no merit and should be rejected.

V - The Minister's Obligation to Provide Documents

[21] The second objection is that the reassessment should be quashed because the Minister failed to provide the documentation requested pursuant to paragraphs 241(4)(a) and (b) of the Act.

[22] I note at the outset that the object of section 241 is the protection of confidential taxpayer information. It prevents an official from divulging private and confidential taxpayer information to third parties.

[23] Subsection 241(4) provides various exceptions as to when an official may "provide taxpayer information." Paragraph (a) refers to providing "to any person taxpayer information" required in the "administration or enforcement of the Act" and paragraph (b) refers to providing "to any person taxpayer information" for the purpose of "determining any tax, interest or penalty or other amount that might be available to the taxpayer as a credit or refund".

[24] I find that the use of the word "person" refers to third parties who may request confidential "taxpayer information" and not to the taxpayer in question. In other words, subsection 241(4) is not intended as an instrument to gather information about a taxpayer's own file. That was not the intent of Parliament.

[25] When the reassessment was confirmed on April 13, 2021, it was based on the Minister's conclusion that the documentation provided was inadequate such that it is not clear what other documentation could have been disclosed by CRA officials following a request pursuant to paragraphs 241(4)(a) and (b).

[26] It is apparent the Appellant could have made an access to information request but there is no evidence he did so. In any event, the evidence suggests that the Appellant was provided with the form T401 Report on Objection containing a full explanation as to why the reassessment was confirmed.

[27] I thus conclude that this argument has no merit and must also be rejected.

1st Issue: ***The first substantive issue to be determined is whether the Appellant was entitled to claim a deduction of $20,000 allegedly paid to his spouse?***

[28] The Appellant testified on his own behalf. He was in the business of selling air conditioners, furnaces and heat pumps or other such related appliances under the brand name of Lennox. He had a contractual arrangement with Costco and an exclusive territory. At the Costco entrance, there was a *kiosque* with blank preprinted forms that prospective clients could fill out to express their interest.

[29] These forms were collected and calls were made to qualify the prospective purchasers. If qualified, an appointment was scheduled. The Appellant met the prospective client and submitted a proposal. If it was accepted, a contract was signed and the Appellant was entitled to a commission.

[30] The Appellant claims that Liette Robillard made the calls and scheduled the appointments and was paid for her services as a self-employed person. It is admitted that she was not paid directly but it is argued that the following amounts were paid to her indirectly including $34,918 in 2016 and $31,417 in 2017.

[31] The Appellant claims that these amounts were paid as her share of mortgage payments, cash withdrawals or other debit transactions from a joint bank account. He produced bank statements to supports these alleged payments.

[32] During cross-examinations, the Appellant admitted that he had not kept any records of the payments made to his spouse and that, although the amount claimed was less that the amount alleged to have been paid to her, he had no understanding as to how it had been quantified. He relied on his accountant to determine the appropriate amount to be claimed. He also admitted that the cash withdrawals and debit transactions were for ordinary household expenses and were not necessarily specific to his spouse. No deposit was made to her personal bank account.

[33] The Appellant also argued that the determination of an employer-employee relationship or contract with a self-employed person or independent contractor was a matter of provincial law subject to the provisions of the *Civil Code of Quebec*, (C.c.Q.) and that article 1683 applied. It provides as follows:

> Where the qualities of creditor and debtor are united in the same person, confusion is effected, extinguishing the obligation. Nevertheless, in certain cases where confusion ceases to exist, the effect ceases also.

[34] The Respondent made a number of arguments as follows:

i. There was no evidence that the alleged $20,000 payment was incurred or actually paid to Liette Robillard;

ii. Any amounts that are alleged to have been paid to Liette Robillard were in fact joint family expenses not directly related to her;

iii. There was no evidence of any services performed by Liette Robillard and the Appellant could not produce a log or note book or list of customers allegedly contacted by her at any time in 2016 or 2017;

iv. The Appellant failed to maintain proper Books and Records as required by subsection 230(1) of the Act;

v. Article 1683 of the C.c.Q. did not apply because there was no evidence that Liette Robillard was a creditor;

vi. The Appellant failed to demolish the Minister's assumptions.

[35] This was addressed in *Burlando c. HMTQ*, 2014 TCC 92 where a husband argued it would make no sense for him to pay his wife by cheque to be deposited in a joint bank account. Justice Miller rejected this argument noting at paragraph 12 that "where there is an alleged working relationship between non-arm's length parties, there should have been some documentation or independent evidence to support the working relationship."

[36] Similarly, in *Blott v. The Queen*, 2018 TCC 1, Justice Campbell dealt with an alleged contractual relationship between a husband and wife. He concluded at paragraphs 13-14 that there was no evidence of the services rendered, no set hours or schedule and that the evidence was "simply too vague to support a working employment relationship". I find this reasoning would apply if the claim had been that the taxpayer's wife was an independent contractor.

[37] In closing submissions, it was argued that there was no need to produce an actual contract and the Appellant's testimony was sufficient to establish the status of his wife as an independent contractor and the amounts paid to her. It was argued further that the Respondent had not produced a *contrepreuve*.

[38] I find that these argument must be rejected and agree with the Respondent that there are no books and records and no supporting documentation. The Appellant's

testimony alone is not sufficient to rebut the Minister's assumption that the amounts claimed were neither incurred nor actually paid to Liette Robillard.

[39] On that basis, I find that the Minister correctly denied the expenses. If this raises an issue of double taxation, it may be possible for her to file a T1 Adjustment to reduce the income reported during the subject taxation years.

2nd Issue: ***The second substantive issue to be determined by the Court is whether the Appellant was entitled to claim a deduction for the amounts alleged to have been paid to Fernand Doucet for each of the 2016 and 2017 taxation years?***

[40] The Appellant testified that Mr. Doucet was well known in the area as a "scrapper" in that his work involved the removal of old furnaces, heating systems or air conditioning units used primarily in schools or churches. Although it was not explained, these items were presumably sold for parts or as scrap metal.

[41] If Mr. Doucet referred a potential sales opportunity and the Appellant was able to submit a proposal for a Lennox system and obtain a contract, he was entitled to a referral fee. The amount was not a fixed percentage and depended on the nature of the referral and profit potential of the sales opportunity for the Appellant.

[42] As explained by the Appellant, Mr. Doucet was not an employee or a sub-contractor. He was merely a free-agent who sometimes made referrals.

[43] Mr. Doucet did not testify but the Appellant produced an invoice from him dated December 1, 2016 for $5,000 plus GST and QST. A second invoice for $4,000, plus GST and QST dated December 17, 2017 was also adduced. The invoices were standard pre-printed forms that referred to "labour and materials". There was a manuscript note indicating "solicitation" but no other handwritten notes were legible. No further details as to the number or nature of the referrals was provided.

[44] The Appellant also submitted a receipt allegedly signed by Fernand Doucet to acknowledge receipt of a cash payment of $5,748 from the Appellant "pour la solicitation de clientele potentielle dans la region de Laval et Laurentides." There was no indication as to when or where the receipt was signed but it was titled December 30, 2016. A second receipt was provided for a cash payment of $4,599. It contained the same language to explain the payment and was titled December 30, 2017.

[45] When asked when the receipts were signed, the Appellant referred to the dates of the receipt.The Appellant was unable to provide any other proof of payment such as a cancelled cheque because that the amounts had been paid to Mr. Doucet with cash on hand that had been accumulated from personal resources and mostly from cash-gifts received from his mother–in-law who had always been very generous.

[46] The Appellant argued that the invoices each had a GST and QST number such that if CRA had cross checked the information, they could have seen that the amounts had been reported by Mr. Doucet, at least for and GST/QST purposes.

[47] It was also argued that the Respondent had not presented any *contrepreuve*.

[48] The Respondent raised a number of objections including the fact that Mr. Doucet had not testified, the Appelant's testimony was uncorroborated and there were no details of the services received, no evidence of the cash payments and no books and records to provide some form of record of the payments.

[49] The Respondent relied on the recent decision of *Pierre Juneau Rénovations Inc. v. HMTQ*, 2020 CCI 54 where Justice Masse relied on the earlier decision of *Garage Gilles Gingras c. SHMTQ*, 2010 TCC 343 where the Court indicated the following:

> [74**]** Using cash is legal and legitimate, but it does frankly raise scepticism, being a common practice in work under the table, tax avoidance, etc. Cash leaves no or so few traces that a plausible explanation can always be given depending on the context.

[50] At paragraphs 50 and 51, Justice Masse concludes as follows:

> [50] It is not disputed that the use of cash generally leaves fewer traces. When operating a business, it is the taxpayer's responsibility to keep appropriate books and records. This is an obligation imposed by the Act: (…) In this case, there are no books, no records and no supporting documentation.
>
> [51] The appellant has not satisfied me through evidence and explanations that are clear, consistent, reasonable and credible that the cheques payable as "cash" were associated with the subcontracts.

[51] In this instance, the Court may reasonably infer that the cash payments were made at the request of Fernand Doucet as the Appellant had nothing to gain from doing so. That being the case, it is difficult to reconcile the request for cash with the

signature of a receipt. Why would Fernard Doucet have requested cash and then signed a receipt. The Appellant indicated that the receipt was signed on the date indicated being December 30th, 2016 and December 30th 2017. The Court is left with the impression that the Appellant was not entirely truthful on this issue and that the receipts were likely signed at a later date in order to create a paper-trail in the context of CRA's request for documentation and the preparation of this appeal.

[52] The difficulty once again is the lack of details that would allow the Court to determine how the amounts were calculated. The invoices provide few details and are very general in nature. The best that can be said is that the Appellant has produced some "supporting documentation."

[53] In the end, the test is whether the Appellant has established on a balance of probabilities that he paid the amounts claimed to Mr. Doucet as a referral fee. I am of the view that he has done so and find that the amounts claimed were indeed paid for a business purpose such that the Appellant was entitled to claim them.

[54] The appeal is therefore allowed and the reassessment is referred back the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to a deduction for the amounts paid to Fernand Doucet for both the 2016 and 2017 taxation years.

[55] There shall be no order as to costs.

Signed at Ottawa, Ontario, this 17th day of June 2024.

"Guy R. Smith"

Smith J.

CITATION:	2024 TCC 90
COURT FILE NO.:	2021-1679(IT)I
STYLE OF CAUSE:	JEAN-MARIE ROBILLARD AND HIS MAJESTY THE KING
PLACE OF HEARING:	Montréal, Québec
DATE OF HEARING:	May 30, 2024
REASONS FOR JUDGMENT BY:	The Honourable Justice Guy R. Smith
DATE OF JUDGMENT:	June 17, 2024

APPEARANCES:

For the Appellant:	Richard Venor
Counsel for the Respondent:	Simon Dufour

COUNSEL OF RECORD:

For the Appellant:

Name:	Richard Venor
Firm:	Richard Venor &Co
For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada