Docket: 2013-3408(IT)I

BETWEEN:

MICHAEL TULMAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 18, 2014, at Toronto, Ontario.

Before: The Honourable Justice Kathleen T. Lyons

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Kathleen Beahen

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2011 taxation year is dismissed.

Signed at Ottawa, Canada, this 9th day of May 2014.

"K. Lyons"

Lyons J.

Citation: 2014 TCC 140
Date: 20140509
Docket: 2013-3408(IT)I

BETWEEN:

MICHAEL TULMAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lyons J.

[1] This is an appeal by Michael Tulman, the appellant, from a reassessment of his 2011 taxation year whereby the Minister of National Revenue (the "Minister") disallowed a deduction for employment expenses. The appellant initially claimed employment expenses totalling $17,937,[1] and subsequently increased the claim to $24,120 (the "Amount") relating to a trip to Las Vegas.[2]

[2] At the hearing, the appellant informed the Court that he is no longer claiming a deduction in respect of the vehicle expenses referred to in the Amended Reply.[3] The disputed Amount comprises:

Travel Expenses	$7,539
Entertainment, Gifts and Promotional Items	$16,580

[3] The issue is whether the appellant is allowed to deduct the Amount as employment expenses in the 2011 taxation year.

[4] The appellant testified that MenuPalace.com (“MenuPalace”) was started in 1999 and by 2011 it had grown to thirty employees. In 2011, he was the Chief Executive Officer and an employee of MenuPalace (his “employer”). He said that he had no written employment contract in 2011 because he employed himself. He was also the CEO and shareholder of MTGL Holdings Inc. (doing business as Dealfind.com) ("MTGL"). MTGL is a shareholder of MenuPalace.[4] He

stated that because he was a thirty-three per cent shareholder of Dealfind and he contributed to its growth, he should get thirty per cent of the expenses.

[5] According to the appellant, he went to Las Vegas to attend the Yellow Pages Convention ("Convention"). He described it as full of seminars, booths and exhibits which attracts companies that do mostly local advertising such as Groupons. He also wanted to meet with three individuals from three separate companies that were potentially interested in MenuPalace and/or Dealfind. He identified the individuals as Eric Lefskovsky (Groupon), Mr. Shamis (Ricon) and Mr. Vartran (PC Medics).[5] The appellant stated that his trip was a month in advance of negotiations that would take place with the potential of a $3l million dollar financing deal.

[6] The appellant confirmed in cross-examination that he went to Las Vegas because of the Convention and for a business trip. However, in response to subsequent questions by counsel for the respondent, the appellant admitted that the Convention had ended on April 19, 2011, which was the day before he arrived. He agreed that Good Friday was on April 22, 2011 and Easter Monday was on April 25, 2011. He also admitted that most employees are not required to work on statutory holidays.

[7] In re-direct examination, the appellant stated that executives go before or after the Convention to hold meetings.

[8] He testified, and confirmed in cross-examination, that his employer did not require him to go to Las Vegas. He said that he was permitted to attend but the expenses would not be paid by his employer. He stated that he incurred the Amount as expenses to obtain larger bonuses. He explained that he received $630,000 in salary which is tied to his performance to increase his bonus and take-home pay. He stated that in 2010 he was signing big contracts for $2 or $3 million.

[9] In cross-examination, he was asked about an Executive Employment Agreement, dated June 30, 2012 and signed by the appellant as the CEO of MTGL (the "Agreement"). The Agreement is between MTGL and the appellant. He said that the Agreement shows that he was making over $150,000 as the CEO in MTGL, and that the bonus is tied to his performance which is similar to his arrangement with MenuPalace in 2011. The appellant acknowledged that under the Agreement that only reasonable travelling expenses incurred by him would be reimbursed by the MTGL, but he was permitted to incur other employment-related expenses for which he would not receive any reimbursement.[6]

[10] Counsel for the respondent produced a completed Form T2200, Declaration of Conditions of Employment for the 2011 taxation year ("Form").[7] The appellant agreed it had been signed by Jason Redman, a former Chief Financial Officer of the employer, and that he was authorized to sign the Form which is dated April 16, 2012. The evidence established that in certifying the conditions of employment, the employer indicates on the Form that the appellant was required to pay for expenses for which he did or will receive reimbursement, but was not required to pay other expenses for which he would not be reimbursed nor receive an allowance.[8] It also indicates that he was not paid by commission according to the volume of sales made or contracts negotiated.[9] The appellant admitted that commission was not paid but said it could have been paid. He suggested that Mr. Redman had incorrectly completed the Form.

[11] During cross-examination, the appellant acknowledged that the hotel bill, totalling $6,179, is for the five-day trip to Las Vegas commencing on April 20, 2011 immediately before the Easter long weekend.[10] The bill includes charges for the room, movies, spa, laundry, restaurants, in-room dining and eight charges for the mini bar during his stay. He said that he was not with his wife. When questioned as to the expenses relating to one of the restaurants, the Wazuzu which he had attended three times, he said that he did not recall how many people were with him or who accompanied him.

[12] He also acknowledged that the lounge bill, totalling $2,786, was for what he described as a social gathering with four other people at the lounge.[11] The bill includes two bottles of Veuve ($790), a bottle of Patron Silv. tequila ($425), a Carafe ($65), six smart water ($54), six Corona beer ($54) and one bottle of Dom Perignon ($795). He said that two people from Ricon were at the gathering. When asked by counsel for the respondent as to whether he had agendas, calendars or other documentation to corroborate the meetings, he said that he had lost access to emails and calendars as it was Google-based.

[13] The appellant admitted, in cross-examination, that he had previously been audited by the Canada Revenue Agency ("CRA") relating to travel expenses to Panama City in 2004 and since 2008 he was aware of the need to document expenses for trips.

Arguments

[14] The appellant argued that he decided to take a business trip to Las Vegas to enable him to potentially earn larger bonuses which are linked to his performance

in implementing the business plan. He asserted that although he did not receive commission income in 2011, the bonuses are akin to commission income. Therefore, he is entitled to deduct the Amount as employment expenses.

[15] The respondent argued that the trip was for personal purposes, therefore the Amount, part of which was unsubstantiated, comprises non-deductible personal expenses.

[16] Even if the Amount comprises employment-related expenses, he was not required by his employer to pay the expenses as mandated by paragraphs 8(1)(*f*) and 8(1)(*h*) of the *Income Tax Act* (the "*Act*"). The respondent relies on the Form which states that in 2011 the appellant was not required to pay for other expenses for which the appellant did not receive an allowance or reimbursement.

[17] Alternatively, the respondent argued that the appellant is not permitted to deduct the amount of $16,580 as he was not remunerated by commission income in 2011 pursuant to paragraph 8(1)(*f*) of the *Act*.

[18] In the further alternative, if he received commission income, the appellant is only entitled to deduct fifty per cent of the amounts expended for meals, beverages and entertainment in accordance with section 67.1 of the *Act*.[12]

Legislation

[19] Subsection 8(2) stipulates that no amounts other than those specifically described in section 8 may be deducted in computing income from an office or employment. In this case, the relevant provisions of the *Act* are as follows:

> **8**(1) **Deductions allowed.** In computing a taxpayer's income for a taxation year from an office or employment, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto
>
> …
>
> (*f*) **Sales expenses** - where the taxpayer was employed in the year in connection with the selling of property or negotiating of contracts for the taxpayer's employer, and
>
> (i) under the contract of employment was required to pay the taxpayer's own expenses,

(ii) was ordinarily required to carry on the duties of the employment away from the employer's place of business,

(iii) was remunerated in whole or part by commissions or other similar amounts fixed by reference to the volume of the sales made or the contracts negotiated, and

(iv) was not in receipt of an allowance for travel expenses in respect of the taxation year that was, by virtue of subparagraph 6(1)(*b*)(v), not included in computing the taxpayer's income,

amounts expended by the taxpayer in the year for the purpose of earning the income from the employment (not exceeding the commissions or other similar amounts referred to in subparagraph 8(1)(*f*)(iii) and received by the taxpayer in the year) to the extent that those amounts were not

(v) outlays, losses or replacements of capital or payments on account of capital, except as described in paragraph 8(1)(*j*),

(vi) outlays or expenses that would, by virtue of paragraph 18(1)(*l*), not be deductible in computing the taxpayer's income for the year if the employment were a business carried on by the taxpayer, or

(vii) amounts the payment of which reduced the amount that would otherwise be included in computing the taxpayer's income for the year because of paragraph 6(1)(*e*);

…

(*h*) **Travel expenses** - where the taxpayer, in the year,

(i) was ordinarily required to carry on the duties of the office or employment away from the employer's place of business or in different places, and

(ii) was required under the contract of employment to pay the travel expenses incurred by the taxpayer in the performance of the duties of the office or employment,

amounts expended by the taxpayer in the year (other than motor vehicle expenses) for travelling in the course of the office or employment, except where the taxpayer

(iii) received an allowance for travel expenses that was, because of subparagraph 6(1)(*b*)(v), 6(1)(*b*)(vi) or 6(1)(*b*)(vii), not included in computing the taxpayer's income for the year, or

(iv) claims a deduction for the year under paragraph 8(1)(*e*), 8(1)(*f*) or 8(1)(*g*);

…

8(4) **Meals.** An amount expended in respect of a meal consumed by a taxpayer who is an officer or employee shall not be included in computing the amount of a deduction under paragraph 8(1)(*f*) or 8(1)(*h*) unless the meal was consumed during a period while the taxpayer was required by the taxpayer's duties to be away, for a period of not less than twelve hours, from the municipality where the employer's establishment to which the taxpayer ordinarily reported for work was located and away from the metropolitan area, if there is one, where it was located.

…

67.1(1) **Expenses for food, etc.** Subject to subsection (1.1), for the purposes of this Act, other than sections 62, 63, 118.01 and 118.2, an amount paid or payable in respect of the human consumption of food or beverages or the enjoyment of entertainment is deemed to be 50 per cent of the lesser of

(*a*) the amount actually paid or payable in respect thereof, and

(*b*) an amount in respect thereof that would be reasonable in the circumstances.

Analysis

[20] The appellant has the onus to demolish the Minister's assumptions in order to show that the reassessment is incorrect. He has failed to discharge that onus as he has not shown that the Amount comprises employment-related expenses, nor has he shown that he was required by his employer to pay his own expenses in the Amount for the trip to Las Vegas. He has also failed to show that he received commission income in 2011.

Nature of expenses

[21] Initially the appellant testified, and confirmed in cross-examination, that he went to Las Vegas to attend the Convention, and described the nature and the format of the event. He subsequently admitted, however, that he had arrived in Las Vegas the day after the Convention ended and immediately before the Easter long weekend. He also said that it was a business trip as he wanted to meet with the three individuals he identified. With the exception of stating that two individuals from Ricon attended a social gathering at the lounge, the appellant provided little,

if any, evidence detailing or corroborating such meetings, and did not produce any documentary evidence, such as calendars, agendas or other information, for those or any other meetings or activities relating to the Amount of expenses claimed. No witnesses were called by the appellant to testify to corroborate his testimony as to the meetings or activities. This evidence does not instill confidence.

[22] Apart from the hotel and lounge bills, produced by counsel for the respondent, the appellant did not provide any other bills or details in support of the remaining part of the Amount. The hotel and lounge bills, $6,179 and $2,786, respectively, show charges for a hotel room, movies, spa, laundry, restaurants, in-room dining, eight charges for the mini-bar items, beverages and alcohol. When questioned as to who accompanied him and how many people were present at the Wazuzu restaurant, he said that he did not recall. This paucity of detail is a concern especially since the appellant was aware, since at least 2008, of the need to be able to substantiate claims for travel expenses.

[23] Considering the inconsistency in his testimony as to the Convention, the timing of the trip over the Easter long weekend, and the nature of the expenses reflected on the two bills, and considering the appellant's generalized statements in his evidence without any documentary evidence and very little detail relating to meetings or activities during his trip, on the balance of probabilities, I find that the Amount comprises personal expenses.

[24] In light of the above conclusion and although unnecessary, I will deal with the remaining points since a fair amount of evidence was directed to those points.[13]

Did the employer require the appellant to pay his own employment expenses?

[25] To qualify for a deduction for an employment expense specified in paragraphs 8(1)(*f*) or 8(1)(*h*), a taxpayer must satisfy the conditions in each provision.

[26] In terms of the appellant’s situation, even if the Amount comprises employment related expenses, the applicable conditions the appellant must still satisfy are found in subparagraph 8(1)(*f*)(i), relating to sales expenses, and subparagraph 8(1)(*h*)(ii), relating to travel expenses, that comprise the Amount.

[27] Those subparagraphs read:

> **8**(1) **Deductions allowed.** In computing a taxpayer's income for a taxation year from an office or employment, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto
>
> …
>
> (*f*) **Sales expenses** - where the taxpayer was employed in the year in connection with the selling of property or negotiating of contracts for the taxpayer's employer, and
>
> (i) under the contract of employment was required to pay the taxpayer's own expenses,
>
> …
>
> *(h)* **Travel expenses** - where the taxpayer, in the year,
>
> …
>
> (ii) was required under the contract of employment to pay the travel expenses incurred by the taxpayer in the performance of the duties of the office or employment, …

[28] To be eligible for a deduction under either subparagraph, the appellant must show that he was "required" by his contract of employment to pay his own sales expenses and travel expenses incurred by him in conjunction with his employment, and for which he is not entitled to reimbursement from his employer.

[29] There is a distinction in being permitted to do something and being required to do something as noted by Bowie J. in *Morgan v Canada*, 2007 TCC 475, 2007 DTC 1360, at paragraph 12.

[30] Absent an express requirement in a written contract, if it is tacitly understood by the employer and employee that such payment was to be made and necessary to fulfill the duties, that would suffice.

[31] In his testimony, the appellant said that there was no written contract. However, by his own admission, and as confirmed in cross-examination, the appellant's understanding was that he was permitted but not required to pay the sales and travel expenses comprising the Amount relating to the trip to Las Vegas. Thus, it was his choice to pay such expenses to enable him to earn larger bonuses. The admission is reinforced by the answers on the Form, signed by Mr. Redman,

which provides evidence of the terms of employment. The Form indicates that the appellant would be reimbursed for certain expenses for which he was required to pay for, but would not be reimbursed, nor receive an allowance, for other expenses he was not required to pay for.[14] I accept this as compelling proof. Thus, while the employer permitted the appellant to pay the Amount, the appellant was not required by his employer to pay it as mandated by subparagraphs 8(1)(*f*)(i) and 8(1)(*h*)(ii).

[32] In *Karda v Canada*, 2005 TCC 564, 2005 DTC 1375, the court found that it may have been a smart economic decision for the employee to voluntarily incur car employment expenses to improve his bonus and create additional income, but under the ordinary meaning of subparagraph 8(1)(*f*)(i), he was not required to pay for such expenses. This is analogous to the appellant's situation in seeking to earn larger bonuses.

[33] Similarly, in *Pitzel v Canada*, [2002] 2 CTC 2949, paragraphs 8(1)(*f*) and 8(1)(*h*) and subsection 8(2) were under consideration. Angers J. held that even though additional expenses incurred by Mr. Pitzel were employment related, Mr. Pitzel was not required by his employer to incur such expenses. Despite Mr. Pitzel was a fifty per cent shareholder plus an employee and had a reason to benefit beyond a mere employee, the expenses were not deductible because the employer did not require him to incur the expenses.

[34] In view of the testimony of the appellant and the conditions of his employment on the Form, it is not possible to find that he was "required" by his employer to pay the Amount. Therefore, the appellant fails to meet the conditions under subparagraphs 8(1)(*f*)(i) and 8(1)(*h*)(ii) and is precluded from deducting the Amount.

[35] I conclude that there was no evidence that the appellant was required to incur employment expenses in the Amount claimed. Thus the appellant is ineligible for the deduction. I now turn to the other condition in subparagraph 8(1)(*f*)(iii).

Commission fixed by reference to sales volumes or contracts negotiated

[36] As previously noted, under subparagraph 8(1)(*f*)(iii), an employee may deduct sales expenses but the employee must be employed in the year in connection with selling property or negotiating contracts for his employer, and be

remunerated wholly or partially by commissions or similar amounts fixed by the volume of sales made or contracts negotiated.

[37] In *Griesbach v. Canada (Minister of National Revenue – MNR)*, 91 DTC 142, Christie J. concluded that the bonus was not akin to a commission under section 8 because the determination was not by direct reference to the sales volume. At page 3, paragraph 5, Christie J. stated:

> To my mind the result is that in order for expenses to be deductible under that paragraph the remuneration pertaining thereto must be fixed by reference to the volume of the sales made or the contracts negotiated by the taxpayer claiming those deductions. Twenty per cent of the pre-tax gross profits of an employer with a number of employees is not synonymous with remuneration so fixed.

[38] In his testimony the appellant admitted, and confirmed in cross-examination, that he did not receive commission income, and stated it could have been paid. He also agreed that the Form, signed by Mr. Redman, indicates that the appellant was not paid wholly partially by commission according to the volume of sales made or contracts negotiated.[15] Subsequently, he suggested that Mr. Redman had made an error in completing the Form. However, he did not call Mr. Redman to testify to corroborate the purported error. As noted by counsel for the respondent, the Form had been completed four months after the conclusion of 2011. This would have given Mr. Redman an opportunity to look back and determine if commission income had been paid. I infer that no error was made and accept this evidence.

[39] Despite his admission that he did not receive commission income, the appellant urged the Court to characterize the bonus as commission income since his bonus is tied to his performance. He referenced Schedule A in the Agreement in support of his assertion. In his closing argument, the appellant added that it ties into the implementation of business plans. I note that the Agreement refers to salary and then states that the amount of the bonus, if any, shall be tied directly to the attainment of annual objectives as determined by the Board in its sole discretion.[16]

[40] In the present case, the Agreement, referenced by the appellant in his testimony, links the bonus (if any) to the performance of annual corporate objectives. In my view, neither that nor the implementation of business plans is a sufficient nexus to qualify as remuneration fixed by reference to sales volumes or contracts negotiated to bring the appellant within the ambit of subparagraph 8(1)(*f*)(iii).[17] Furthermore, no other explanation was provided as to how the bonus was quantifiable in order to qualify as remuneration so fixed.[18]

[41] Based on the evidence, I find that the appellant was not remunerated wholly or partially by commissions or other similar amounts fixed by reference to the volume of the sales made on the contracts negotiated pursuant to subparagraph 8(1)(*f*)(iii). Since commission income is a pre-requisite to deductibility, I conclude that the appellant is precluded from deducting the amount of $16,580 for entertainment, gifts, and promotional items.

[42] I conclude that the appellant is unable to deduct the expenses in the Amount claimed under paragraph 8(1)(*f*) or paragraph 8(1)(*h*) of the *Act*.

[43] The appeal is dismissed.

Signed at Ottawa, Canada, this 9th day of May 2014.

"K. Lyons"

Lyons J.

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1 Of that amount, the Minister allowed $2,061.

2 The amounts have been rounded down.

3 Nor is $112 for supplies in dispute.

4 Dealfind.com ("Dealfind") sold deal of the day coupons and became a division of MenuPalace.

5 He explained the nature of Ricon's business as buying, refurbishing and reselling Apple products. PC Medics produced no name tablets, similar to Ipad, and had previously sold 3,000 tablets through a daily coupon deal.

6 Exhibit R-6, paragraphs B.2. and B.6. The Agreement was sent by his accountant to the Canada Revenue Agency to support the Amount he claimed as employment expenses.

7 Exhibits R-1 and R-7. The Form had been sent by the accountant to the Canada Revenue Agency with a letter dated October 22, 2012. Subsection 8(10) requires a taxpayer to obtain an executed form T2200, from his employer, certifying the conditions of employment for the applicable year.

8 Exhibit R-7, numbers 6 and 7.

9 Exhibit R-7, number 8.

10 Exhibit R-3.

[11] Exhibit R-5.

[12] All references to sections, subsections, paragraphs and subparagraphs that follow are to the *Act*.

[13] Except for section 67.1.

[14] Exhibit R-7. The Form also shows that the appellant could, and did, receive reimbursements for travel, meals and accommodation from his employer in 2011 in the amount of $1,151.25 which is unrelated to the Amount.

[15] Exhibit R-7.

[16] Agreement – Clauses B.1. and B.2.

[17] In *Hay v Canada*, [2001] 4 CTC 2742, it was held that since the bonus was a formula calculation based on performance in many work areas of responsibility, there was an insufficient nexus given her various work duties and responsibilities to conclude she received commission income within the meaning attributed to subparagraph 8(1)(*f*)(iii).

[18] The appellant stated that in 2010 that $2 or $3 million contracts had been negotiated, but that has no bearing on what happened in 2011, the year under appeal.

CITATION:	2014 TCC 140
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PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 18, 2014
REASONS FOR JUDGMENT BY:	The Honourable Justice Kathleen T. Lyons
DATE OF JUDGMENT:	May 9, 2014

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Kathleen Beahen

COUNSEL OF RECORD:

For the Appellant:

Name:	n/a
Firm:	

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada