Docket: 2011-3407(IT)G

BETWEEN:

VINCENT DICOSMO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 12 and 13, 2015 at Toronto, Ontario
(written submissions subsequently received)

Before: The Honourable Justice Judith Woods

Appearances:

Counsel for the Appellant:	Mauro Marchioni
Counsel for the Respondent:	Darren Prevost

JUDGMENT

The appeal with respect to assessments made under the *Income Tax Act* for the 2003, 2004 and 2005 taxation years is dismissed, with costs to the respondent.

Signed at Toronto, Ontario this 11th day of December 2015.

"J.M. Woods"

Woods J.

Citation: 2015 TCC 325
Date: 20151211
Docket: 2011-3407(IT)G

BETWEEN:

VINCENT DICOSMO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] The appellant, Vincent DiCosmo, was reassessed under the *Income Tax Act* for the 2003, 2004 and 2005 taxation years to disallow certain deductions that were claimed in computing income.

[2] Four issues are raised by Mr. DiCosmo:

(a) Was it proper for certain amounts claimed as employment expenses to be disallowed?

(b) Was it proper for amounts claimed as allowable business investment losses to be disallowed?

(c) Was an amount claimed as a representation fee properly disallowed?

(d) Are the reassessments statute barred?

[3] The statute bar issue will be dealt with first.

Are reassessments statute barred?

[4] Mr. DiCosmo submits that the relevant notices of reassessment are statute barred because they were issued after the normal reassessment period had ended.

[5] This matter was not raised as an issue in the pleadings and first came to my attention in Mr. DiCosmo's written submissions received after the hearing. Not surprisingly, the Crown submits that this argument should not be considered because the Crown would be prejudiced by the late notice.

[6] I agree with the Crown's position on this issue. The Crown properly based its case on the issues to be decided as stated in the notice of appeal. Accordingly, no evidence was led by the Crown concerning a statute bar issue.

[7] Mr. DiCosmo submits that there is no prejudice because the Crown was aware there was a disagreement between the parties as to the date of the notices of reassessment. This is clear, it is suggested, from the Amended Reply which states that the Crown does not agree with the statements in the notice of appeal as to these dates.

[8] I do not agree with this submission. Taxpayers are required by the applicable Rules of the Court to state in their notices of appeal basic information as to the appeal, including the issues to be decided. Fairness dictates that the Crown can rely on these statements. In Mr. DiCosmo's notice of appeal, he states the issues to be decided and the statute bar issue is not among them. Accordingly, the Crown properly led no evidence on this point. It would be unfair to the Crown to have the Court consider this issue and I decline to do so.

Background

Employment expenses

[9] Over the three taxation years at issue, Mr. DiCosmo was employed as a salesman for three corporations, selling telecommunication equipment to customers such as Shaw and Rogers.

[10] Mr. DiCosmo was entitled to reimbursement by all three corporations for expenses he incurred in relation to his employment. For the 2003, 2004 and 2005 taxation years, he received reimbursements as follows: $58,522, $12,812, and $35,802, respectively.

[11] In addition to the reimbursed expenses, Mr. DiCosmo also claimed deductions for unreimbursed employment expenses in his tax returns. For the 2003, 2004 and 2005 taxation years, respectively, the following amounts were deducted: $40,830, $40,591, and $40,867.

[12] In the reassessments at issue, the Minister allowed only a very small portion of the deductions claimed, namely: $3,910, $5,062, and nil.

Allowable business investment losses

[13] For each of the 2003, 2004 and 2005 taxation years, Mr. DiCosmo claimed deductions on account of allowable business investment losses in the following amounts: $63,999, $22,000, and $39,500, respectively.

[14] Mr. DiCosmo submits that these losses relate to investments that were recommended by his tax accountant, Dean Jones. According to the testimony of Mr. Jones, the investments consisted of loans and shares in two corporations that carried on active businesses, Robert Leeder Sales Limited and Fortuity International Inc.

[15] In the reassessments, the Minister disallowed the losses in their entirety.

Representation fee

[16] Mr. DiCosmo claimed a deduction for the 2005 taxation year on account of a representation fee paid to Mr. Jones' firm, Jones and Associates. The amount of the deduction is $38,213.

[17] The deduction was disallowed in its entirety.

Discussion

General

[18] I will first briefly summarize my conclusion, which is that this appeal should fail mainly because Mr. DiCosmo did not provide sufficient reliable evidence to rebut, on a *prima facie* basis, the key pleaded assumptions of fact made by the Minister of National Revenue to support the reassessments.

[19] To a large extent, the evidence in support of Mr. DiCosmo's case was oral testimony. There was a woeful lack of supporting documentation.

[20] As for the oral testimony, the main testimony came from Mr. DiCosmo and Mr. Jones, his tax accountant, and support was provided by Robert Leeder, who according to the testimony is the shareholder of Robert Leeder Sales Limited and is also a client of Mr. Jones. I did not find the testimony of any of these individuals to be reliable in relation to key aspects of this appeal.

[21] I would also comment that a document that was introduced into evidence by Mr. DiCosmo as the invoice supporting the representation fee paid to Jones and Associates was later admitted by Mr. Jones to be an "incorrect" invoice after a different invoice with the same date was introduced by the Crown on cross-examination.

[22] Mr. Jones suggested in his testimony that the document originally introduced was an administrative error. Although this is possible, it seems highly unlikely. It is more likely that the "incorrect" document was fabricated to support the tax deduction.

[23] There are two reasons for this conclusion. First, the document which is admitted to be incorrect purports to be an invoice for investment advice, and accordingly appears to be an attempt to support the deduction claimed in the tax return for a representation fee. The document that Mr. DiCosmo submits is the true invoice is for general tax services. I do not believe that this is an administrative error, as suggested by Mr. Jones. The incorrect invoice appears to have been created to mislead as to the nature of the services provided. In addition, it appears that the incorrect document was prepared subsequently because the total amount in both invoices is the same except that the incorrect document adds GST to an already GST-included total in the actual invoice. In other words, it appears that the incorrect document was prepared subsequently based on the amount owing in the actual invoice. The circumstances strongly suggest that the incorrect document was intended to mislead.

[24] The introduction into evidence of what appears to be a false document does not assist Mr. DiCosmo in this appeal because his appeal relies to a great extent on the reliability of his own testimony and that of Mr. Jones.

Employment expenses

[25] I will first consider the claim for employment expenses. Based on the Minister's assumption stated at paragraph 10(r) of the Amended Reply, Mr. DiCosmo must establish on a *prima facie* basis that he incurred unreimbursed employment expenses of more than the amounts allowed by the Minister.

[26] Over the three taxation years at issue, Mr. DiCosmo received significant reimbursements for employment expenses from his employers, over $100,000 in total. Mr. DiCosmo testified that this did not represent all his employment expenses and that he purposely did not ask for reimbursement for all of the expenses because of the large amounts expended. Mr. DiCosmo deducted additional amounts representing unreimbursed employment expenses totalling over $120,000 for the three years. The Minister allowed deductions totalling approximately $9,000.

[27] Mr. DiCosmo's stated rationale for not claiming all the expenses was that such a large reimbursement claim could adversely affect his remuneration.

[28] In his testimony, Mr. DiCosmo also provided an explanation for why he is certain that none of the amounts deducted in the tax returns were actually reimbursed. He testified that he sent original receipts to his employers, and that he did not have copies. Accordingly, the receipts provided to Mr. Jones for deduction in the tax returns had to be for non-reimbursed expenditures, he stated.

[29] The main problem with this testimony is that it is self-serving. Virtually no supporting documentation was provided. The deduction of employment expenses by taxpayers should generally be supported by contemporaneous documentation so that the Court can be satisfied that the deductions are proper. In this case, Mr. DiCosmo needed to provide sufficient evidence to support the deductions claimed, including supporting documentation that the amounts had not been reimbursed. I find Mr. DiCosmo's testimony to be completely unsatisfactory in this regard.

[30] Mr. DiCosmo relied in support on documents that had been prepared by the CRA auditor which appear to summarize the expenses. The auditor was not called to testify to explain these documents and it is not appropriate to give them much weight. I would also comment that the reassessments at issue only allow approximately $9,000 in total.

[31] I would also mention one item in particular. Mr. DiCosmo seeks a deduction for salaries purportedly paid to his spouse and two of his children in a total amount

of $44,000 over the three years. Mr. DiCosmo stated that his children worked in his home office doing such chores as cleaning and that his spouse did some administrative work, such as answering phones. There was no documentation to support the salary expenditures, and Mr. DiCosmo could not even provide a breakdown of the amounts paid to each of the family members. Overall, the testimony supporting these expenses was too vague to be considered reliable.

[32] Counsel for Mr. DiCosmo submits that the oral testimony should be believed because much of the evidence was not contradicted by the Crown and the Crown did not call the CRA auditor. The problem with this submission is that the true facts in this case are within the knowledge of Mr. DiCosmo. It is up to him to make a *prima facie* case.

[33] Counsel for Mr. DiCosmo also submits that the CRA auditor did an unsatisfactory job in the audit. I fail to see how this assists Mr. DiCosmo in this appeal. If the audit is flawed, Mr. DiCosmo had the opportunity to establish the correct result by providing reliable evidence at the Court hearing. The evidence provided fell far short of this.

[34] Mr. DiCosmo's position seems to be that the Court should accept self-serving testimony as to employment expenses without further support. The Federal Court of Appeal stated long ago that this is not satisfactory: *Njenga v.The Queen*, 96 D.T.C. 6593, at para. 3:

> The Income tax system is based on self-monitoring. As a public policy matter the burden of proof of deductions and claims properly rests with the taxpayer. The Tax Court Judge held that persons such as the Appellant must maintain and have available detailed information and documentation in support of the claims they make. We agree with that finding. Ms. Njenga as the Taxpayer is responsible for documenting her own personal affairs in a reasonable manner. Self written receipts and assertion without proof are not sufficient.

Allowable business investment losses

[35] An allowable business investment loss (ABIL) is a type of capital loss that is partly deductible against any source of income. In general, an ABIL may be claimed in respect of a loss arising from a loan or shares in a corporation which qualifies as a small business corporation, as defined in the *Act*. Mr. DiCosmo submits that he incurred losses in each of the taxation years at issue in respect of loans and shares of two qualifying corporations, Robert Leeder Sales Ltd. and Fortuity International Inc.

[36] The assumptions made by the Minister to disallow the losses, as pleaded, are reproduced from paragraph 10 of the Amended Reply:

[…]

s) the appellant claimed allowable business investment losses on his income tax returns of $63,999, $22,000, and $39,500 for the 2003, 2004, and 2005 taxation years, respectively;

t) the appellant represented that the allowable business investment losses claimed for the 2003 and 2004 taxation years were with respect to loans made to Robert Leeder Sales Limited and Fortuity International Inc.

u) the appellant provided no details regarding the nature of the investment giving rise to the allowable business investment loss claimed for the 2005 taxation year;

v) the appellant did not loan any funds to either Robert Leeder Sales Limited or Fortuity International Inc.;

w) the appellant did not loan any funds to any other small business corporation;

x) the appellant did not dispose of any shares of a small business corporation during the years under appeal;

y) the appellant did not dispose of any debt owed to him by a small business corporation during the years under appeal;

z) neither Robert Leeder Sales Limited nor Fortuity International Inc. were small business corporations at any relevant time;

aa) Fortuity International Inc. did not carry on an active business in Canada at any relevant time, as it was a holding company;

bb) Fortuity International Inc. did not cease any operations during or prior to the 2004 taxation year;

cc) Fortuity International Inc. did not have any debt obligations outstanding during the years under appeal;

dd) Robert Leeder Sales Limited did not carry on an active business in Canada at any relevant time, as it was an investment corporation;

ee) Robert Leeder Sales Limited did not have any debt obligations outstanding, other than to its shareholders, during the years under appeal;

ff) the appellant was not a shareholder of Robert Leeder Sales Limited;

[…]

[37] In my view, there is not sufficient reliable evidence to rebut the key assumptions on a *prima facie* basis, namely the assumptions in paragraphs 10 (v) to (ff), inclusive.

[38] Mr. DiCosmo had very little recollection of the details of these corporations or his investments, which he stated he made on the recommendation of Mr. Jones, his tax accountant. The investments were relatively large. Since an ABIL can be claimed for only one-half of the amount of the loss, Mr. DiCosmo's position must be that he invested over $240,000 in these two corporations.

[39] It makes no sense that Mr. DiCosmo, an experienced and highly paid salesman, would invest large amounts of money in corporations in which he had little knowledge. Mr. Dicosmo testified that he was comforted in part by the potential for tax relief if the investments were lost, but this relief is only for a relatively small portion of the amount invested. It is highly unlikely that such large investments would be made without Mr. DiCosmo fully understanding the likelihood that the investments would be profitable. I did not find Mr. DiCosmo's testimony to be convincing.

[40] Second, there was absolutely no documentation to support the deductions that were claimed. It is highly unusual that such investments would be made with no documentation to back them up.

[41] There were no loan agreements, share documentation, agreements for sale, financial statements of the corporations, or even documentation supporting the existence of the corporations. A bankruptcy document was introduced but this appears to relate to Robert Leeder personally and not a corporation.

[42] I was also not satisfied by the oral testimony of Mr. Jones, the tax accountant, or Robert Leeder, the purported shareholder of Robert Leeder Sales Limited. Mr. Jones was responsible for preparing the tax returns of Mr. DiCosmo which included the claiming of these losses. Mr. Jones was not an independent witness, and I did not believe his testimony.

[43] As for Mr. Leeder, his testimony was vague and not convincing. I would note that he is also a client of Mr. Jones and their relationship may have influenced his testimony.

[44] As for Fortuity International Inc., no one from the corporation testified. I would also comment that the purported shareholder of this corporation is the brother of Mauro Marchioni, who is Mr. DiCosmo's counsel in this appeal. If Mr. Marchioni's brother had evidence that was helpful to Mr. DiCosmo, I would have expected him to testify.

[45] As far as the evidence as a whole reveals, there were no investments made by Mr. DiCosmo in either of these corporations. The appeal of the allowable business investment losses will be disallowed.

Representation fee

[46] Mr. DiCosmo seeks a deduction for the payment of an invoice for tax services paid to Mr. Jones' firm, Jones and Associates. The amount is documented in an invoice dated December 30, 2005 in the amount of $38,213.

[47] The assumptions made by the Minister in support of the assessment, as pleaded, are set out below.

[…]

> gg) the appellant claimed a deduction of $38,213 for a representation fee in respect of the 2005 taxation year;
>
> hh) the appellant claimed the deduction of the representation fee in respect of amounts paid to Jones and Associates;
>
> ii) the appellant claimed the deduction of the representation fee in respect of services rendered by Jones and Associates in the 2003, 2004 and 2005 years;
>
> jj) Jones and Associates are the appellant's accountants; and
>
> kk) the principal business of Jones and Associates is not providing investment advice or providing administration or management of investments.

[…]

[48] According to the evidence of Mr. Jones, which I accept, this amount is for general tax services, including advice regarding the holding of shares such as shares provided under employee stock option plans.

[49] Counsel for Mr. DiCosmo did not point to any statutory provision that would give a deduction for this expense, and there was no reliable evidence that links the expenditure, or a portion of it, to any particular deductible amount. Further, even if a portion of the expenditure is deductible under some provision, there is no basis on which the Court could reasonably apportion it. The deduction will be disallowed.

Conclusion

[50] For the reasons above, the appeal will be dismissed, with costs to the respondent.

Signed at Toronto, Ontario this 11th day of December 2015.

"J.M. Woods"

Woods J.

CITATION:	2015 TCC 325
COURT FILE NO.:	2011-3407(IT)G
STYLE OF CAUSE:	VINCENT DICOSMO and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 12 and 13, 2015
REASONS FOR JUDGMENT BY:	The Honourable Justice Judith Woods
DATE OF JUDGMENT:	December 11, 2015

APPEARANCES:

Counsel for the Appellant:	Mauro Marchioni
Counsel for the Respondent:	Darren Prevost

COUNSEL OF RECORD:

For the Appellant:

Name:	Mauro Marchioni
Firm:	March Law Vaughan, Ontario
For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario