Docket: 2006-589(IT)I

BETWEEN:

EDWARD KUWALEK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on August 23, 2006 at Vancouver, British Columbia

Before: The Honourable Justice G. Sheridan

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Selena Sit

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2004 taxation year is allowed, in accordance with the attached Reasons for Judgment, and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

1. the $15,000 bonus received by the Appellant in 2004 is employment income and was not properly deductible by the Appellant in that taxation year; and

2. the fees the Appellant paid to the University of Liverpool ought to be included in the computation of the Appellant's non-refundable tax credits for 2004.

Signed at Ottawa, Canada, this 10th day of November, 2006.

"G. Sheridan"

Sheridan, J.

Citation: 2006TCC624
Date: 20061110
Docket: 2006-589(IT)I

BETWEEN:

EDWARD KUWALEK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] The Appellant is appealing the reassessment of the Minister of National Revenue of his 2004 taxation year. The assumptions made by the Minister in disallowing the Appellant's claim for certain deductions are set out below under their respective headings.

Other Deductions

[2] In reassessing the Appellant, the Minister made the following assumptions of fact:

Claim for Other Deductions

a) the Appellant became a resident of Canada for Income Tax purposes in February, 2003 and was a resident of Canada for Income Tax purposes in the 2004 taxation year;

b) the Appellant signed an employment contract with IIC on August 1, 2002 and the terms of the contract would pay the Appellant a gross annual base salary of $75,000.00 (CDN) with the opportunity of a designated performance bonus not in excess of $15,000.00 (CDN);

c) the Appellant provided his services to IIC in Canada as an employee during the 2004 taxation year;

d) IIC issued a 2004 T4 slip and reported that the Appellant had been paid $98,750.00 during the 2004 taxation year;

e) the Appellant reported the employment income of $98,750.00 received from IIC during the 2004 taxation year at line 101 on his 2004 T1 Tax return;

f) during the 2004 taxation year, the Appellant did not repay any employment salaries or wages received from IIC or from any other employers;

g) the Appellant's 2003 T1 Tax Return was reassessed on January 5, 2006 to remove $7,500.00 of Other Employment Income reported by the Appellant;

[3] There are two issues in dispute under this heading:

1. whether the $15,000 bonus paid to the Appellant in 2004 for his work from October 2002 to October 2003 was employment income in that taxation year; and

2. when the Appellant became resident in Canada.

[4] The Appellant's position is that no portion of the $15,000 bonus ought to be included in his 2004 income. He submits that of the $15,000 paid to him in 2004, $7,500 ought to be included in his 2003 income because it was in payment of services rendered from April to October 2003, months in which he was resident in Canada. It was on this basis that, when filing his 2003 income tax return, he included $7,500 as employment income[1], even though at the time he filed, he had not yet received any of the anticipated bonus. The bonus was actually paid to the Appellant in three installments of $5,000 beginning in March or April 2004. As for the remaining $7,500, according to the Appellant, that amount was in respect of the months October 2002 to March 2003, the period in which he had not yet become a resident of Canada; therefore, it is not subject to tax liability under subsection 5(1) of the *Income Tax Act*.

[5] The Minister's primary position is that the Appellant was a resident in Canada in 2004 and received the $15,000 bonus in that year; accordingly, the entire amount is properly included as employment income for 2004 pursuant to sections 3, 5 and 6 of the *Act*. According to this premise, the month in which the Appellant became a resident of Canada in 2003 is not relevant to the Appellant's tax liability in 2004. Should I decide otherwise, however, the Respondent submits that the Appellant became a resident of Canada in February 2003.

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[1] The Minister has since reassessed the Appellant's 2003 taxation year to remove the $7,500 reported by the Appellant in 2003.

[6] In my view, the relevant date in terms of triggering the Appellant's tax liability is October 2003, the month in which his performance bonus became payable. In his letter to the Surrey Tax Centre explaining the basis for reporting half of the bonus in his 2003 income tax return[2], the Appellant wrote:

> ...
>
> Under my employment contract I am eligible for a yearly performance bonus of CAD $15,000. In Oct/2003 such bonus became payable, however it was not actually paid out and consequently was not included in my T4 slip. ...

[7] The Appellant's employment contract was entered as Exhibit A-3. Clause 4 of that document bears the heading "Salary" and reads:

> You will be paid a gross annual base salary of $75,000 CAD with a designated bonus opportunity of $15,000 CAD, said bonus being dependant upon a combination of individual and corporate performance. Individual performance to be based on individual level of effort toward successfully meeting corporate objectives. Corporate performance to be based on successfully achieving the established corporate business plan.

[8] On my reading of these documents and in view of the Appellant's testimony that he was eligible for a "yearly"[3] performance bonus, the bonus did not become payable until certain conditions precedent were satisfied: first, the Appellant had to have worked for 12 months. In addition, a determination of satisfactory performance had to be made. Thus, none of that could be determined until the completion of the Appellant's first year with IIC, October 2003. There is no provision in the contract to allow for a pro-rating of the bonus; it was all-or-nothing, depending on his and the company's performance considered after the 12-month period of the Appellant's employment. Thus, I do not think it is possible to attribute a fraction of the $15,000 to any particular month in the year. The full amount became payable, subject to a satisfactory individual and corporate performance rating, upon the completion of the 12-month employment period, in October 2003. There is no dispute that, by that time, the Appellant was resident in Canada. This is sufficient to trigger the application of subsection 2(1) of the *Act*:

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[2] Exhibit A-4.

[3] Transcript page 19, lines 1 – 2.

> **Tax payable by persons resident in Canada.** An income tax shall be paid, as required by this Act, on the taxable income for each taxation year of every person resident in Canada at any time in the year.

[9] The source of the Appellant's income as of October 2003 was his employment. While I understand that the Appellant feels that it would be more sensible to tax employment income in the year the work was done, that is not what the *Act* provides. Pursuant to subsection 5(1) and paragraph 6(1)(*a*), employment income is taxable in the taxation year in which it is received[4]. The Appellant does not dispute that he received the $15,000 bonus in 2004; accordingly, it was properly included in the Appellant's employment income for that year.

Tuition Tax Credit

[10] The Minister made the following assumptions with respect to this aspect of the appeal:

> h) during the 2004 taxation year, the Appellant was enrolled in a Master of Science post graduate degree (the "Degree") specializing in an Information Technology program (the "Program") at the University of Liverpool (the "University");
>
> i) the University is located outside of Canada in Liverpool, England;
>
> j) the Appellant paid total Fees in the amount of $10,555.02 (US) to the University in the 2003 taxation year;
>
> k) the Appellant used an exchange rate of $1.5422 to convert the Fees paid in US dollars to Canadian dollars which valued the Fees at $16,278.23 (CDN);
>
> l) to be granted the Degree, the Program required the Appellant to obtain 180 credits calculated as follows:
>
> i) 15 credits would be granted for each module completed;
>
> ii) the Program consisted of eight modules and a final dissertation;
>
> and
>
> iii) 60 credits would be awarded when the final dissertation was completed.

[4] *Nowegijick v. The Queen*, 83 DTC 5041 (S.C.C.).

m) the Appellant completed five modules during the 2004 taxation year and claimed Fees incurred during this taxation year using the formula 75 credits/180 credits x $16,278.23 (CDN) = $6,782.00 (CDN) and claimed this amount as Fees in computing non-refundable tax credits for the 2004 taxation year; and

n) the Program at the University was taken exclusively over the Internet while the Appellant was physically in Canada and not in England.

[11] The relevant provision of the *Act* is paragraph 118.5(1)(*b*) which reads:

> SECTION 118.5: Tuition credit.
>
> (1) For the purpose of computing the tax payable under this Part by an individual for a taxation year, there may be deducted,
>
> ...
>
> *(b)* where the individual was during the year a student in full-time attendance at a university outside Canada in a course leading to a degree, an amount equal to the product obtained when the appropriate percentage for the year is multiplied by the amount of any fees for the individual's tuition paid in respect of the year to the university, except any such fees

[12] The only issue is the proper interpretation of the word "attendance" in the above paragraph. The Appellant says it includes taking "on-line" courses via the Internet. The Minister's position is that it requires a physical presence on campus.

[13] In argument, counsel for the Respondent presented a very helpful review of the case law[5] which demonstrated a certain inconsistency in this Court's interpretation of paragraph 118.5(1)(*b*). All of the decisions considered, like this one, were heard under the Informal Procedure and are, therefore, without precedential value. The Appellant noted[6] that the resulting division in opinion makes it difficult for a taxpayer to know where he stands in respect of a claim for a tuition tax credit.

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[5] *Hlopina v. Canada*, [1998] T.C.J. No. 27 (TCC); *Cleveland v. Canada*, [2004] T.C.J. No. 23 (TCC); *Krause v. Canada*, [2004] T.C.J. No. 23 (TCC); *Yankson v. Canada*, [2005] T.C.J. No. 379 (TCC); *Yankson v. Canada*, [2005] T.C.J. No. 567 (TCC); *Valente v. Canada*, [2006] T.C.J. No. 92 (TCC); *Schultz v. Canada*, [1996] T.C.J. No. 1308 (TCC); *Hewitt v. Minister of National Revenue*, 89 DTC 451 (TCC); *Nowegijick v. The Queen*, 83 DTC 5041 (SCC).

[6] Transcript page 84, lines 2-5.

[14] In the present case, I am satisfied that the Appellant is entitled to claim the tuition tax credit. The Minister does not dispute that in all other respects but "attendance", the Appellant is eligible for the credit. Though not necessary to the resolution of this matter, I feel it bears noting the tremendous effort the Appellant has dedicated to furthering his education while at the same time, relocating himself and his young family from Poland to take on a new position with a new company (that he also helped to establish) in Canada. He has been very successful in what, to my eyes, appears to be a very demanding field of study. His opportunity to do so stems, in part, from his access to Internet-based education.

[15] In the presentation of his evidence, the Appellant described how communication technology has become a part of our daily lives; ordinary tasks that once required our physical presence we now do routinely by electronic means. In response to his acknowledgement on cross-examination that he had never set foot on the campus in Liverpool, he made the following observations:

> Well, I believe majority of people nowadays have on-line banking, do different things on line or through the internet. If I sign up for on-line banking, even though I never set a foot in a bank, all my transactions have the same legal meaning as if I was at the branch doing them manually. So I believe that needs to be said, that our actions on line are not any lesser because they're on line, and doing something over the internet and not going -- trading stocks on the internet and not setting your foot in the brokerage house or exchange house has the same legal meaning or legal bearing as going directly and doing the same thing in person. There is nowadays, for many facets of our life, there is absolutely no difference whether you do something over the internet or you do something in person…[7]

[16] In my view, this is an accurate statement of how much we now rely on electronic services. I can see no justification, in this day and age, for interpreting "attendance" as requiring the physical presence of a student at a campus that otherwise conforms to the requirements of the *Act*. In *Valente v. Canada*[8], Woods, J. reviewed the conflicting case law, noting that it was within Parliament's power to require the student's physical presence at a foreign university but that it had not clearly provided for such a requirement. I agree with her analysis and adopt the comments *in obiter* of Chief Justice Bowman[9] in *Krause v. The Queen*[10]:

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[7] Transcript page 39, lines 20-25 to page 40, lines 1-9.

[8] [2006] T.C.J. No. 92 at paragraph 17.

[9] Cited by Justice Woods in her decision.

[10] 2004 DTC 3265 at paragraph 24.

> It is obvious therefore that the matter is by no means clear-cut. Although I need not decide the point since the appeal must be dismissed in any event because it is from a nil assessment, I think it is strongly arguable that full-time attendance at a foreign university can include full-time attendance through the internet or on-line as is the case here. That view conforms to common sense and to the reality of modern technology. If there continues to be doubt on the point Parliament should move to resolve that doubt.

[17] For these reasons, I am satisfied that the Appellant is entitled to a tuition tax credit in respect of his 2004 taxation year.

[18] The appeal is allowed and is referred back to the Minister for reconsideration and reassessment on the basis that:

1. the $15,000 bonus received by the Appellant in 2004 is employment income and was not properly deductible by the Appellant in that taxation year; and

2. the fees the Appellant paid to the University of Liverpool ought to be included in the computation of the Appellant's non-refundable tax credits for 2004.

Signed at Ottawa, Canada, this 10th day of November, 2006.

"G. Sheridan"

Sheridan, J.

CITATION:	2006TCC624
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APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Selena Sit

COUNSEL OF RECORD:

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