

Docket: 2007-3348(IT)I

BETWEEN:

GINETTE TAUPIER GIRARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on March 4, 2008, at Montréal, Quebec.

Before: The Honourable Justice François Angers

Appearances

For the Appellant: The Appellant herself

Counsel for the Respondent: Vlad Zolia

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2004 and 2005 taxation years is dismissed in accordance with the attached Reasons for Judgment.

Signed at Edmundston, New Brunswick, this 9th day of May 2008.

"François Angers"

Angers J.

Translation certified true
on this 17th day of June 2008.
Carole Chamberlin, Translator

Citation: 2008TCC176
Date: 20080509
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Appellant,

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REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal from reassessments made against the Appellant on June 19, 2006, for the 2005 taxation year and on January 29, 2007, for the 2004 taxation year. The Minister of National Revenue (the "Minister") denied the Appellant employment expense deductions of \$7,461 for the 2004 taxation year and \$15,867 for the 2005 taxation year.

[2] During the two years in question, the Appellant worked for a travel agency, Agence aux Cinq Continents inc. (the "Agency"). Her income for 2004 was \$32,418, including \$7,461 in commission earnings. For 2005, it was \$32,337, including \$7,295 in commission earnings.

[3] The Appellant was hired in October 2003 as a travel consultant. She was to work 40 hours a week at the rate of \$12 an hour. In addition, her employer agreed to allow her to do some outside, commission-based work, with 60 per cent of the earnings going to the Appellant and 40 per cent, to the Agency. Of note is the fact that the Appellant had to go through the Agency to bill for her work as an outside travel agent, as the Agency was the only one with the travel agency licence and the right to use a trust account, among other things.

[4] However, the Agency and the Appellant only signed a work contract, for a period of one year, on September 17, 2004. It stated, as set out above, that the Agency would pay the Appellant a gross base salary of \$12 per hour. It would also pay the Appellant 60 per cent of the commission earnings on sales of travel products made by the Appellant. Handwritten notes added that the sales in question were "personal" sales. The Appellant explained in her testimony that commission had been paid on sales of travel products to her own clients and not those of the Agency. It was this clause that was the source of the misunderstandings between the Agency and the Appellant.

[5] According to the Appellant, when she had started work with the Agency, she had had her own list of clients, and it was the use of this list in return for a share of the commissions that she had negotiated with the Agency. However, she contended that the Agency had not allowed her to work on her personal files or meet with her personal clients during her regular hours of work. This fact was more or less confirmed by the Agency representative, Ms. Lafond, when she explained that it would not have been profitable for the Agency to pay the Appellant a commission on sales made to her personal clients if those sales were being made during her hours of work for the Agency.

[6] The Appellant therefore set up some work space at home with a computer, cell phone and office supplies, and she incurred expenses related to training, a home office, advertising, and so on. These various expenses were denied by the Minister of National Revenue and are the subject of this appeal for the two taxation years in question.

[7] According to the Appellant, she had had to work on her personal files and meet with her personal clients away from the Agency, which was why she had set up an office at home and incurred the expenses she had claimed as deductions. According to Ms. Lafond's testimony, the only requirement placed on the Appellant was that she carry out her work for personal clients outside her 40 hours of work for the Agency. The Appellant moreover admitted that the Agency had never required that she or other employees set up offices at home.

[8] The relationship between the Agency and the Appellant deteriorated over time and this resulted in some changes in the conditions. According to Ms. Lafond, the Appellant's hourly wage was increased and the payment of commission discontinued. However, the Appellant had allegedly continued to make sales of travel products to her personal clients through another travel agency, and when Ms. Lafond had found

out, the Appellant had quit her job with the Agency. According to the Appellant, however, she had been dismissed.

[9] In 2004, the Agency signed form TP-64.3 (General Employment Conditions) for the Quebec Department of Revenue. It also allegedly signed the equivalent form, the T-2200, for 2004, but a copy of that form was not introduced in evidence. The parties indicated that the answers to the questions had been the same. According to the General Employment Conditions form for 2004, the Appellant received \$7,644.98 in commissions, received no allowance or reimbursement of expenses, and received no payment for office rent, the salary or wages of an assistant or substitute, or the cost of supplies. According to the information entered on the form, the Appellant was not required to perform some or all of her duties away from the employer's place of business.

[10] The answers to questions 5, 9, 10, 11, 12, 15 and 17 were all altered. Ms. Lafond had signed the form on behalf of the Agency. She stated that she had given the opposite answer to what was indicated for questions 5 and 9 and that she would have initialed the other changes if she had been the one to make them. For example, question 5 asks whether the employee had to perform some duties away from the place of business during working hours. The answer on the form is "yes", but Ms. Lafond indicated that the answer was actually "no". Question 9 asks whether the employer was required to provide a motor vehicle. The answer is "yes", but Ms. Lafond indicated that the answer was "no". Question 12 asked whether the Appellant was required to maintain an office outside the employer's establishment exclusively to earn employment income and to meet clients or other persons on a regular and continuous basis in the ordinary course of her employment. The initial "no" was changed to "yes". This was also the case for question 15, which asked whether the Appellant was required to purchase supplies used in the performance of her duties. The answer now reads "yes". At question 17, the answer indicates that the Appellant was required to pay certain other expenses, but none are specified.

[11] No form was signed by the Agency in respect of the 2005 taxation year. The Appellant submitted that she was before the Court because Ms. Lafond had refused to sign form T-2200 on behalf of the Agency. A completed, but unsigned form was filed in evidence.

[12] Nevertheless, the Appellant contended in her notice of appeal that she considered herself self-employed as far as her commissions on sales to her personal clients were concerned. If that were the case, the Appellant would not need a statement from her employer to be eligible to claim deductions as a commission

salesperson. The Court therefore deems it necessary to clarify the relationship that existed between the Agency and the Appellant with respect to the personal sales made by the Appellant.

[13] To determine whether or not a contract of employment existed, the Court refers to the *Civil Code of Québec*. Articles 2085, 2086, 2098 and 2099 are the most relevant provisions. They read as follows:

Contract of employment

2085. A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.

2086. A contract of employment is for a fixed term or an indeterminate term.

Contract of enterprise or for services

2098. A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay.

2099. The contractor or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance.

[Emphasis added.]

[14] That said, the evidence adduced clearly shows that, within the context of her employment, the Appellant worked under the direction of the Agency. The employment contract between the Agency and the Appellant is evidence of their intent and, especially, of the fact that the Appellant was required to work full time for the Agency, even if her earnings were different for sales made to her personal clients. The Appellant could not make any personal sales without going through the Agency, as she did not have a licence issued under the *Travel Agents Act*, R.S.Q. c. A-10. Section 5 of that Act provides that the employee of an employer on whose account or on whose behalf a licence is held may perform operations proper to a travel agent without holding a licence himself or herself provided he or she so acts on account of the employer and not on his or her own account. It is clear, then, that the Appellant was required to make her sales of travel products to her clients through the Agency so that the Agency would be the one to assume all the responsibilities toward the

clients and have to meet the obligations under the *Travel Agents Act* such as keeping books and accounts, in particular a trust account.

[15] It is therefore clear that the Agency always maintained the authority to direct or control the performance of the Appellant's work. What was involved, then, was work for remuneration involving two different payment methods, and a relationship of subordination characteristic of a contract of employment.

[16] The Appellant thus was working under two separate contracts of employment, one as a travel consultant for Agency clients, at a set hourly rate, and the other as a travel consultant for her personal clients, but the terms of which required her to work through the Agency and receive a commission. The problem in this appeal is that the terms and conditions of employment were never clearly established, which explains the many misunderstandings and the difficulties encountered by the two parties.

[17] In order to deduct work-related expenses in respect of the commission income earned in the two taxation years at issue, the Appellant must have met the conditions set out in paragraph 8(1)(f) of the *Income Tax Act* (the "Act"). The Court notes straightaway that deductible expenses are limited to those incurred in order for the Appellant to earn commission income, that is, \$7,644.98 and \$7,295.07 for the 2004 and 2005 taxation years respectively. The conditions are set out in paragraph 8(1)(f), which the Court summarizes as follows:

- a. the employment is in connection with the selling or negotiating of contracts;
- b. under the contract of employment, the employee is required to pay his or her own employment expenses;
- c. the employee is ordinarily required to carry on the duties of the employment away from the employer's place of business;
- d. the employee is remunerated in whole or part by commissions;
- e. the employee is not in receipt of an allowance for travel expenses.

[18] Subsection 8(10) of the Act moreover provides that an amount otherwise deductible for a taxation year under paragraph (1)(c), (f), (h) or (h.1) or subparagraph (1)(i), (ii) or (iii) by a taxpayer may not be deducted unless a prescribed form, the T-2200, signed by the employer certifying that the conditions set out in the applicable provision were met, is filed with the taxpayer's return of income for the year. Paragraphs (1)(h) and (h.1) relate to travel expenses and motor vehicle travel expenses. The Appellant also claimed expenses connected with her home office and

the cost of supplies, provided for under paragraph 8(1)(i) of the Act. Subsection 8(10) and paragraphs 8(1)(h) and 8(1)(h.1) of the Act are reproduced below:

8(10)

Certificate of employer

(10) An amount otherwise deductible for a taxation year under paragraph (1)(c), (f), (h) or (h.1) or subparagraph (1)(i)(ii) or (iii) by a taxpayer shall not be deducted unless a prescribed form, signed by the taxpayer's employer certifying that the conditions set out in the applicable provision were met in the year in respect of the taxpayer, is filed with the taxpayer's return of income for the year.

8(1)(h)

Travel expenses

(h) 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(1)(h.1)

Motor vehicle travel expenses

(h.1) 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 motor vehicle expenses incurred in the performance of the duties of the office or employment,

amounts expended by the taxpayer in the year in respect of motor vehicle expenses incurred for travelling in the course of the office or employment, except where the taxpayer

(iii) received an allowance for motor vehicle expenses that was, because of paragraph 6(1)(b), not included in computing the taxpayer's income for the year, or

(iv) claims a deduction for the year under paragraph 8(1)(f).

[19] The Court also notes the requirements under subsection 8(13) of the Act and the restrictions that subsection places on work space in the home:

8(13)

Work space in home

(13) Notwithstanding paragraphs 8(1)(f) and 8(1)(i),

(a) no amount is deductible in computing an individual's income for a taxation year from an office or employment in respect of any part (in this subsection referred to as the "work space") of a self-contained domestic establishment in which the individual resides, except to the extent that the work space is either

(i) the place where the individual principally performs the duties of the office or employment, or

(ii) used exclusively during the period in respect of which the amount relates for the purpose of earning income from the office or employment and used on a regular and continuous basis for meeting customers or other persons in the ordinary course of performing the duties of the office or employment;

(b) where the conditions set out in subparagraph 8(13)(a)(i) or 8(13)(a)(ii) are met, the amount in respect of the work space that is deductible in computing the individual's income for the year from the office or employment shall not exceed the individual's income for the year from the office or employment, computed without reference to any deduction in respect of the work space; and

(c) any amount in respect of a work space that was, solely because of paragraph 8(13)(b), not deductible in computing the individual's income for the immediately preceding taxation year from the office or employment shall be deemed to be an amount in respect of a work space that is otherwise deductible in computing the individual's income for the year from that office or employment and that, subject to paragraph 8(13)(b), may be deducted in computing the individual's income for the year from the office or employment.

[20] The Appellant meets conditions 1, 4 and 5 set out in paragraph 16 of these Reasons in respect of the 2004 and 2005 taxation years.

[21] For 2004, the Appellant allegedly filed form T-2200 with her income tax return and the information on that form allegedly was the same as the information on form TP-64-3 filed with her income tax return to Revenu Québec, which was entered into evidence. On that form, the answer provided by the Agency to the question concerning travel and motor vehicle costs is that the Appellant was not required to perform some or all of her duties away from the Agency's place of business. Ms. Lafond confirmed this in her testimony when she pointed out that the only condition placed on the Appellant had been that she not deal with personal clients during her hours of work for the Agency. Again according to Ms. Lafond's testimony, the Agency's premises and equipment had been available to the Appellant after hours in order for her to serve her own clients. As regards the questions on the T-2200 in respect of which the answers were changed, the answers are inconsistent with the fact that the Appellant was not required to work away from the Agency's place of business and so was not required to travel, use a motor vehicle or incur travel expenses during working hours.

[22] The answers on the form regarding expenses related to work space and supplies were also changed. According to Ms. Lafond, she would have initialled the changes if she had been the one to make them. The Appellant therefore was not required to maintain work space away from the Agency's place of business. And even if she had been required to so do, it is clear from the evidence heard that she would not have been using it exclusively to earn employment income and to meet clients on a regular and continuous basis in the ordinary course of her employment.

[23] Moreover, the Agency did not require her to purchase a computer, software, or other equipment or supplies in the course of her employment. Again, the answer to the question in this regard was changed.

[24] The testimony heard and terms and conditions of the contract entered into evidence have not satisfied the Court that the Appellant was required to routinely perform her duties away from the Agency's place of business. Although it is reasonable to conclude that the Appellant incurred some employment expenses related to her sales to her own clients and that she did some work at home, she was not required to do so by the Agency. This condition is essential to give application to paragraph 8(1)(f). And even if the Appellant had been required to do so, she would have had to establish that her office at home had been the place where she principally performed the duties of her office or employment. The evidence showed that the Appellant's commission sales accounted for no more than 10 to 15 per cent of her

overall sales for the Agency. The Minister was therefore correct in denying the amounts deducted by the Appellant as employment expenses for 2004.

[25] In regard to the 2005 taxation year, the terms and conditions of employment did not change. The Agency did not require the Appellant to have a home office and the Appellant was not required to exercise the duties of her employment away from the Agency's place of business. Accordingly, the Minister was correct in denying the expenses deducted for the 2005 taxation year.

[26] For these reasons, the appeal is dismissed.

Signed at Edmundston, New Brunswick, this 9th day of May 2008.

"François Angers"

Angers J.

Translation certified true
on this 17th day of June 2008.
Carole Chamberlin, Translator

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DATE OF JUDGMENT: May 9, 2008

APPEARANCES:

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