

BETWEEN:

DONALD S. TOBIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 3 and 6, 2009 at Edmonton, Alberta

By: The Honourable Justice Judith Woods

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Leona K. Tesar

JUDGMENT

The appeal with respect to an assessment made under the *Income Tax Act* for the 2005 taxation year is allowed, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

(a) with respect to the truck, deductions should be allowed for 30 percent of the following: (1) \$2,184 for fuel, (2) \$586 for insurance, and (3) \$4,012.75 for capital cost allowance. In addition, a deduction for maintenance and repairs on the truck in the amount of \$1,032.30 should be allowed;

(b) with respect to general business expenses, a total of \$1,077 should be allowed as current expenses and \$2,810 should be treated as the cost of equipment for purposes of capital cost allowance;

- (c) with respect to meals and entertainment, a deduction should be allowed in the amount of \$471.49;
- (d) with respect to a cell phone, a deduction in the amount of \$400 should be allowed; and
- (e) with respect to parking, a deduction in the amount of \$11.70 should be allowed.

The parties shall bear their own costs.

The Registry is directed to refund the Court's filing fee to the appellant.

Signed at Toronto, Ontario this 22nd day of May 2009.

“J. Woods”

Woods J.

Citation: 2009 TCC 278
Date: 20090522
Docket: 2008-3147(IT)I

BETWEEN:

DONALD S. TOBIN,

Appellant,

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HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] The appellant, Donald Tobin, appeals an assessment made under the *Income Tax Act* for the 2005 taxation year. At issue is the deductibility of expenses relating to a sole proprietorship which operated under the name Freight Class 101 Consulting (the “Business”).

[2] The amounts for which Mr. Tobin seeks deductions are summarized in a written submission that was filed after the hearing (Appellant’s submission, para. 97). There are a large number of relatively small expenditures involved, which in aggregate total \$20,591.55.

[3] The assessment at issue allowed deductions in the aggregate of only \$2,941.14. The remainder of the amounts claimed were generally assumed by the Minister not to have been incurred, or not to have been related to the Business.

[4] At the hearing, the Minister made some concessions which were relatively minor. The revised amounts are summarized in a written submission filed after the hearing (Respondent’s submission, Appendix B). As the summary appears to contain a clerical error, I will not confuse matters by setting out the revised position.

[5] I would also mention that Mr. Tobin's submission filed after the hearing contained a number of factual statements that were not mentioned at the hearing. I have not taken these into account.

Discussion

[6] It is acknowledged by the Minister that the Business was a *bona fide* business that commenced in 2005. The only issue is the proper amount of expenses that are deductible.

[7] Mr. Tobin has the initial onus to disprove the assumptions on which the assessment was based. He was the only witness at the hearing.

[8] The Business was in a preparatory state in 2005 and no revenues were earned. Mr. Tobin was also employed in that year on a full-time basis as an account executive with a freight company operating in Canada under the name Con-way Canada Express.

[9] The nature of the Business and the activities undertaken in 2005 were summarized by Mr. Tobin in a letter to the Canada Revenue Agency during the audit (Ex. R-1). Below is the relevant excerpt:

Freight Class 101 Consulting is a company I started to formulate in January 2005. I started working on developing a course outline and talking to customers in early months of 2005. I was at that time employed by Con-Way Canada Express a division of Con-Way/CNF Corp from the USA. In Canada we calculate our freight rates via size and weight or density. To and from the USA there is a far more complicated set of rules that do not always make common sense. In 2005 I was working toward giving classes to companies and individuals to teach them about the rules and classification on freight that moves between the USA and Canada. To this end I would have meetings with people I knew in the industry, as well as many customers and discuss their knowledge and needs in regards to International freight. This included meetings where I would entertain and ask them for their time and knowledge in areas such as purchasing procedures, shipping and receiving procedures and any problems they have had with freight rates and classification.

[10] One of the main issues in this appeal is whether the disallowed amounts reasonably relate to the Business or are in the nature of personal expenditures. If the expenses are personal, the deduction is disallowed by paragraph 18(1)(h) of the *Act*.

[11] For the most part, Mr. Tobin sought to establish the connection between the expenses and the Business through his own testimony.

[12] In order for self-interested testimony such as this to be sufficient proof, the testimony needs to be straightforward, complete, detailed and cogent. In many respects, Mr. Tobin's testimony fell far short of this mark.

[13] The conclusion that I have reached is that the deductions allowed by the Minister are generally fair.

[14] I now turn to specific items.

Start date of business

[15] In making the assessment, the Minister assumed that the Business commenced on June 1, 2005. Expenses incurred prior to that time were accordingly disallowed.

[16] For purposes of this appeal, the parties reached a compromise agreement on a commencement date. The date is agreed to be March 1, 2005 and the Minister's written submission has taken this into account.

Pick up truck

[17] Mr. Tobin claims deductions in relation to a pick up truck, which according to his testimony was used for purposes of the Business. He submits that the truck was used 90 percent of the time for business purposes, for a total of approximately 17,000 business kilometers.

[18] According to Mr. Tobin's written submission, the deductions claimed with respect to the truck are: \$2,184 for fuel, \$586 for insurance, \$2,371.94 for maintenance and repairs, and capital cost allowance in the amount of \$4,012.75.

[19] The Minister disagrees with this claim in two respects.

[20] First, the Minister has assumed that the business use of the truck did not exceed 30 percent.

[21] Second, the Minister assumed that the business-related expenditures on maintenance and repairs are \$742.30 (Reply, para. 12(o)). This was increased to

\$1,032.30 as a result of the change in commencement date (Respondent's Submission, para. 56).

[22] I would first mention a problem with the computation by the Minister of the deduction for maintenance and repairs.

[23] In the assessment, the Minister allowed a deduction for maintenance and repairs of only 30 percent of \$742.30 (Reply, para. 11). It is not appropriate to make this personal use reduction because the Minister had assumed, according to the Reply at least, that \$742.30 represents the business portion only.

[24] As regards all of the truck expenditures, the main issue is the proportion of business use. My conclusion is that the Minister's assumption of 30 percent business use should not be disturbed.

[25] I would first note that Mr. Tobin did not make a mileage log available in support of his claim for 90 percent business use of the truck. Although a negative inference is often warranted in these circumstances, I have not done so because Mr. Tobin provided a plausible explanation for the loss of the relevant records.

[26] Although I have not made a negative inference from the failure to produce a log, I have nevertheless not been convinced by Mr. Tobin's position regarding the business use of the truck. My reasons are as follows.

[27] By way of background, the truck had belonged to Mr. Tobin's common-law spouse before they commenced living together around March 2005. At times during the testimony, Mr. Tobin referred to the vehicle as his spouse's. However, he did claim, and was allowed, capital cost allowance with respect to the vehicle. It appears that the Minister did not question the purported ownership of the vehicle during the audit.

[28] In addition to having use of the truck, Mr. Tobin also had use of a Con-way company car. It was available for any use and Con-way reported a \$3,000 taxable benefit in respect of "personal use" in 2005.

[29] There was some suggestion at the hearing that Mr. Tobin paid for personal use of the Con-way car but I do not think that this is supported by the evidence as a whole.

[30] In his written submission, Mr. Tobin brings up the possibility (which was not raised during the testimony) that he and his spouse may have had other automobiles available to them. At page 18 he states:

[...] I have not been asked nor did I testify to the availability of other autos for our use. I testified that I sold the 1999 Chevy Tahoe in December of 2004. Do you think that Ms. Moir [common-law spouse] would be without a vehicle having release[d] the Chevy truck to me for business use? There is also no testimony in the record as to the ability of Ms. Moir to operate a vehicle at all times in 2005. The Respondent seems to be in the habit of forming assumptions without fact and is creating a scenario without proper information or foundation to support their version of events.

[31] This submission is contradictory to a statement made by Mr. Tobin in a letter to the CRA written during the audit process. In that letter (Ex. R-1), Mr. Tobin states:

[...] In 2005 we had three vehicles at our disposal, a 1999 Chevy Tahoe, license (DAH051) also the 2001 Chevy Truck (USL844) and a car provided to me from Con-way Canada express.

[32] There are a couple of problems with these statements. First, the reference to the 1999 Tahoe in the letter to the CRA appears to be misleading at best. This vehicle was sold in 2004. Also, the letter makes no mention of another vehicle, as suggested in Mr. Tobin's submission to the Court.

[33] At best these statements are misleading, and I find them to be troubling in relation to the reliability of Mr. Tobin's testimony in general.

[34] In addition to this, when the evidence regarding the use of vehicles is considered as a whole, the amount of business use that is claimed, 17,000 kilometers, seems very high.

[35] It is difficult to understand how Mr. Tobin could conveniently and economically use the truck in connection with the Business. It makes more sense for the Con-way car to be used throughout the business day, unless the truck was needed for a particular use relating to the Business.

[36] Mr. Tobin did provide an explanation as to how he used the Con-way car and the truck but I did not find the explanation to be convincing.

[37] Mr. Tobin's employment as an account executive with Con-way required him to be on the road visiting customers on a constant basis. A company car was made available for this purpose, and there was no restriction on its use.

[38] Much of the activity in relation to the Business occurred during the regular work day when Mr. Tobin was also engaged in Con-way business. There was also an overlap between Con-way's customers and persons whom Mr. Tobin would want to contact in connection with the Business.

[39] I accept that the truck was needed for the Business on occasion, for example for safety demonstrations, but I am not satisfied that the Business need was a common occurrence.

[40] The Minister has agreed to deductions relating to the truck based on 30 percent business use. I am not satisfied that further deductions are warranted.

[41] Based on the foregoing, the expenditures that should be allowed with respect to the truck are 30 percent of the following: (1) \$2,184 for fuel, (2) \$586 for insurance, and (3) \$4,012.75 for capital cost allowance. In addition, a deduction for maintenance and repairs on the truck in the amount of \$1,032.30 should be allowed.

[42] Regarding capital cost allowance on the truck, I would mention that Appendix B of the Minister's submission appears to contain an error because CCA has not been reduced for personal use. This is inconsistent with the assumptions in the reply and it appears to be a clerical error in Appendix B. The CCA should be pro-rated to take personal use into account.

Legal fees

[43] During his testimony, Mr. Tobin abandoned a claim for a deduction in the amount \$187.50 for legal fees.

[44] It is unclear to me from the written submission whether Mr. Tobin now wishes to revive this claim. If that is the case, I am afraid that it is too late.

[45] Mr. Tobin also made a claim for \$60 in respect of a building permit for renovations to his home and yard. I am not satisfied that this reasonably relates to the Business.

Rent

[46] A deduction on account of rent in the amount of \$278 was disallowed by the Minister. This claim has been abandoned.

[47] During his testimony, however, Mr. Tobin stated that he is also claiming a deduction for \$104.86 on account of storage for one month. The expenditure is likely included as part of office expenses, he stated. I am not satisfied that the storage charge is reasonably attributable to the Business as opposed to being a personal expense. It should not be allowed.

Interest

[48] A deduction for interest in the amount of \$2,190 is being claimed. It is suggested that \$657 relates to the truck and that the balance should be allocated to working capital for the Business.

[49] The Minister disallowed the deduction in its entirety.

[50] I would agree with the Minister on this issue.

[51] In order for interest to be deductible, it is necessary to trace the direct use of the borrowed money to a business use. The evidence as a whole is insufficient to satisfy this requirement.

[52] Mr. Tobin testified that the borrowed money relates to a line of credit which was obtained prior to 2005 for the purpose of purchasing the Tahoe that was sold in 2004. I understand that the sale proceeds from the Tahoe, \$8,750, were used to purchase a principal residence. Mr. Tobin suggests that this should be attributed to business use because he received his spouse's truck, or at least use of it, in return.

[53] It may have been possible to trace some of the borrowed money to the truck if the evidence had clearly established that the spouse had transferred beneficial ownership of the truck to Mr. Tobin in exchange for giving up an interest in the home. The evidence was insufficient to establish this.

[54] As for the balance of the borrowed money, there is not sufficient evidence which traces this to a business use.

[55] The deduction for interest was properly disallowed by the Minister.

General business expenses

[56] Mr. Tobin claims a deduction for expenses totaling \$4,614 under the category “Business.” During the hearing, Mr. Tobin did not dispute that \$2,810 of this amount should be capitalized in respect of equipment purchases.

[57] The position of the Minister is that a total of \$1,077 should be allowed as current expenses and that \$2,810 should be treated as the cost of capital expenditures.

[58] Mr. Tobin submitted a list of the expenses that were incurred. A large number of them seem to be personal expenses. There is not a sufficient evidentiary basis to allow a greater deduction than what the Minister has allowed.

Meals and entertainment

[59] Mr. Tobin is claiming deductions for meals and entertainment in the amount of \$999.79 on the basis that this represents one-half of business-related meal and entertainment expenses.

[60] The Minister’s position is that the deduction should not exceed \$471.49.

[61] Mr. Tobin testified that he incurred these expenses to solicit customers for the Business, develop a client base and to make sure that he understood the customer’s needs.

[62] The Minister has allowed approximately one-half of the expenses claimed. In the absence of more detailed evidence, there is not a sufficient basis to allow a greater deduction than what the Minister has agreed to.

Cell phone

[63] Mr. Tobin claims a deduction for cell phone use in the amount of \$921.48.

[64] In the assessment, the Minister did not allow any part of this but the Minister now concedes a deduction in the amount of \$200.

[65] I accept that more than \$200 of cell phone charges reasonably relate to the Business. In the absence of better evidence, I am prepared to accept an arbitrary increase to \$400 as a reasonable deduction for business use of a cell phone.

Travel

[66] In the income tax return, Mr. Tobin claimed a deduction for business-related travel in the amount of \$2,026.16. All of this was disallowed by the Minister.

[67] Mr. Tobin did not attempt to justify all of these amounts at the hearing. What he did claim is an amount for air fare and car rental for a week long trip that he and his spouse took to Nevada. Part of the trip was admittedly personal.

[68] Mr. Tobin introduced into evidence a letter from an acquaintance in Nevada which stated that he had met with Mr. Tobin in Nevada about investing in the Business.

[69] I accept that this meeting took place, but I am not satisfied that the business aspect of the Nevada trip was a substantial part. In particular, I do not accept Mr. Tobin's evidence that the business meeting lasted several days.

[70] In my view, the Minister was correct not to allow a deduction for any part of this trip. If a taxpayer conducts a small amount of business on what is essentially a personal trip, in my view the expenses of the trip do not thereby become deductible. It is a matter of degree, but in this case, I am not satisfied that the trip had a sufficient business connection to justify a deduction.

Parking

[71] An expense of \$11.70 for parking has been conceded by the Minister.

Home expenses

[72] The parties agree that the home expenses have been properly disallowed.

Conclusion

[73] As a result, the appeal will be allowed, and the assessment will be referred back to the Minister to make the following adjustments:

- (a) with respect to the truck, deductions should be allowed for 30 percent of the following: (1) \$2,184 for fuel, (2) \$586 for insurance, and (3) \$4,012.75 for capital cost allowance. In addition, a deduction for maintenance and repairs on the truck in the amount of \$1,032.30 should be allowed;

- (b) with respect to general business expenses, a total of \$1,077 should be allowed as current expenses and \$2,810 should be considered as the cost of capital expenditures on equipment;
- (c) with respect to meals and entertainment, a deduction should be allowed in the amount of \$471.49;
- (d) with respect to a cell phone, a deduction in the amount of \$400 should be allowed; and
- (e) with respect to parking, a deduction in the amount of \$11.70 should be allowed.

[74] As for costs, each party shall bear their own.

Signed at Toronto, Ontario this 22nd day of May 2009.

“J. Woods”

Woods J.

CITATION: 2009 TCC 278
COURT FILE NO.: 2008-3147(IT)I
STYLE OF CAUSE: DONALD S. TOBIN AND
HER MAJESTY THE QUEEN
PLACE OF HEARING: Edmonton, Alberta
DATES OF HEARING: April 3 and 6, 2009
REASONS FOR JUDGMENT BY: The Honourable Justice J. Woods
DATE OF JUDGMENT: May 22, 2009

APPEARANCES:

For the Appellant: The Appellant himself

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COUNSEL OF RECORD:

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Name: n/a

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