Docket: 2008-91(IT)I

BETWEEN:

NORTON SOLOMON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeal of
Thomas Steynor, *2008-92(IT)I* on December 11, 2008,
at Ottawa, Ontario,

By: The Honourable Justice C.H. McArthur

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Julian Malone

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2003, 2004 and 2005 taxation years are dismissed.

Signed at Ottawa, Canada, this 24th day of June, 2009.

"C.H. McArthur"

McArthur J.

Docket: 2008-92(IT)I

BETWEEN:

THOMAS STEYNOR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeal of
Norton Solomon, 2008-91(IT)I on December 11, 2008,
at Ottawa, Ontario,

By: The Honourable Justice C.H. McArthur

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Julian Malone

JUDGMENT

The appeal from the purported reassessment made under the *Income Tax Act* for the 2004 taxation year is quashed.

The appeal from the reassessment made under the *Act* for the 2005 taxation year is dismissed.

Signed at Ottawa, Canada, this 24th day of June, 2009.

"C.H. McArthur"

McArthur J.

Citation: 2009 TCC 320
Date: 20090624
Dockets: 2008-91(IT)I
2008-92(IT)I

BETWEEN:

NORTON SOLOMON and
THOMAS STEYNOR,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

McArthur J.

[1] These appeals were heard simultaneously and for the most part on common evidence for Mr. Solomon's 2003, 2004 and 2005 taxation years and Mr. Steynor's 2005 taxation year. The issues boil down to whether the Appellants received taxable benefits from their employer, TRS Relief Solutions Inc. ("TRS") for travel expenses, and secondly, whether they are entitled to allocate part of their 2005 employer's income to taxation years 2003 and 2004. It was difficult to determine all the remedies the Appellants were seeking. They were employed by TRS, a corporation owned and operated by the Appellant, Thomas Steynor. I have accepted the issues as presented by the Respondent and no others.

[2] I do not believe it is contested that Mr. Steynor's Notice of Appeal for 2004 was filed prior to the 90-day period allowed to the Minister of National Revenue after the filing of the Appellant's objection to vacate, confirm or reassess Mr. Steynor, rendering his attempted appeal for 2004 not properly before the Court and it is hereby quashed.

[3] The kilometres travelled by both Appellants for business purposes is uncontested.

[4] The first position of the Respondent is that the 60 cents per kilometre that the Appellants were paid, by their employer, was not reasonable pursuant to subparagraph 6(1)(*b*)(v) of the *Income Tax Act* (the "*Act*") and section 7306 of the *Income Tax Regulations*. Secondly, the Respondent submits that the taxpayers cannot, retroactively, allocate part of the income they received and expenses in 2005 to previous years 2003 and 2004. There is no reference to this in the Replies to the Notices of Appeal. The Notices of Appeal state "The expense accounts were for two corporate fiscal years, but over a three-year calendar period".

[5] The facts as I understand them include the following. The Appellants worked for TRS which was in the business of collecting money for charities.[1] I believe the Appellants' focus was recruiting and organizing commissioned collectors although the evidence in regard to their duties was vague like most other statements referred to. A seven-page Management Employment Agreement for Mr. Solomon (Exhibit A-1) refers to employment duties at paragraph 1.a.;

> the employee has the required skills and experience to perform the duties and exercise the responsibilities required of a Marketing Director and Director of Finance".[2]

Strangely, the agreement was not presented until the day of the hearing of the appeals, although Canada Revenue Agency ("CRA") had been dealing with the Appellants for over a year.

[6] Exhibit A-1, Document #17, is a CRA 2005 Income Statement for TRS indicating:

> "Total Revenue $665,529" and Operating Expenses of $657,018 which includes $580,472 paid for Commissions[3] and $75,960 paid for travel expenses.

It is the travel expenses that are the primary subject of these appeals.

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1 Details of the "tax relief" were not placed in evidence. The Appellant asserted that the purpose of the corporation was to offer charitable relief to African countries.

2 They more than likely prepared the Agreement themselves.

3 The evidence with respect to commissions was not clear but I infer that they retained many people to do the actual collections. Nothing falls on this.

[7] In 2005, the Appellants were paid by TRS the amount of 60 cents per kilometre for their business travel which the Respondent finds unreasonably high. Both Appellants state in part in their Notices of Appeal:

> Relevant facts overlooked;
>
> My SUV carries equipment, goods, and passengers, and it also acts for a motel room on many nights. **There are many occasions that I sleep in the Vehicle.** It is used as an office with a permanent telephone installed. On many occasions I park with the engine running providing electricity for the computers and coolers in the back of the vehicle or for heat during the winter months. This vehicle is my traveling office.
>
> **My vehicle is not an automobile as defined in subsection 248(1) of the *Income Tax Act* because it meets the exception in subparagraph (e)(ii) as being a similar vehicle used all or substantially all of the time in the year to transport goods, equipment or passengers,** or as an office and/or bedroom.

[8] The two Notices of Appeal are confusing in that they are, for the most part, identical, yet should have set out the specific and different amounts for each taxpayer along with other differences in duties, etc. For example, only Mr. Steynor drove an SUV (Hyundai Santa Fe). Mr. Solomon testified that he drove a Ford 150 (pick-up truck) for business purposes; my decision is not affected by this although it is unlikely he slept in his truck.

[9] The first issue is whether the rate to be applied per kilometres travelled should be 60 cents or closer to 40 cents per kilometre as provided in *Regulation* 7306 of the *Act*.[4] Mr. Steynor claimed $16,245 for 27,075 kilometres. The Minister allowed $10,047 for the 27,075 kilometres. Mr. Solomon claimed $19,697 for 32,829 kilometres. The Minister allowed $12,118 for the 32,829 kilometres.

[10] The relevant legislation includes subsection 6(1)*(b)*(v) of the *Act* which reads in part:

> 6(1) There shall be included in computing the income of a taxpayer for a taxation year as income from an office or employment such of the following amounts as are applicable:
>
> …

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[4] The Appellants were allowed $0.42 per kilometre for the 5,020 kilometres driven and $0.36 for the remaining kilometres. See paragraph 8(f) of the Replies and subparagraph 6(1)*(b)*(v) of the *Act* and section 7306 of the Regulations set out above.

> (b) all amounts received by the taxpayer in the year as an allowance for personal or living expenses or as an allowance for any other purpose, except
>
> …
>
> (v) reasonable allowances for travel expenses received by an employee from the employee's employer in respect of a period when the employee was employed in connection with the selling of property or negotiating of contracts for the employee's employer, …[5] [Emphasis added]

The Respondent's counsel submits that the rate to be applied is that set out in *Regulation* 7306, as changed for 2005, which reads as follows:

> 7306. For the purposes of paragraph 18(1)(*r*) of the *Act*, the amount in respect of the use of one or more automobiles in a taxation year by an individual for kilometres driven in the year for the purpose of earning income of the individual is the total of
>
> (*a*) the product of 36 cents multiplied by the number of those kilometres;[6]
>
> (*b*) the product of 6 cents multiplied by the lesser of 5,000 and the number of those kilometres; and
>
> (*c*) the product of 4 cents multiplied by the number of those kilometres driven in the Yukon Territory, the Northwest Territories or Nunavut.

[11] The Appellants further submit that their vehicles are not automobiles as defined in subsection 248(1) because they meet the exception in the definition of "automobile" in subparagraph 248(1)*(e)*(ii) in that their vehicles were used "all or substantially all for the transportation of goods, equipment or passengers in the course of gaining or producing income". I agree with the counsel for the Respondent that the Appellants have not advanced sufficient evidence to establish that their vehicles fall within the exception of subparagraph 248(1)*(e)*(ii). No doubt, at least the SUV carried an impressive display of office equipment that was used for the benefit

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5 *Income Tax Act*, subparagraph 6(1)*(b)*(v).

6 This is taken from the 2005 *Regulation*, however, it indicates a proposed amendment to replace 36 cents with 39 cents for 2005. It is this amendment to 39 cents that the Minister applies to the travel expenses.

of their employer but the evidence, which was, for the most part, general statements, falls far short of establishing that their vehicles were:

> 248(1)*(e)*(ii) of a type commonly called a van or pick-up truck, or a similar vehicle, the use of which, in the taxation year in which it is acquired or leased, is all or substantially all for the transportation of goods, equipment or passengers in the course of gaining or producing income, or …[7]

[12] I do not agree with the Appellants' submission that 60 cents per kilometre was reasonable and in arriving at that decision, I rely on the impressive evidence and position of the Respondent's auditor, Bryce Corbett. He accepted the mileage as submitted by the Appellants, although an earlier auditor did not. In my opinion, the payment to them in 2005 of 60 cents per kilometre is completely unreasonable and cannot be claimed as travel pursuant to the *Act* and *Regulations*.

[13] I will now deal with the question of whether the Appellants can arbitrarily allocate part of their 2005 income to previous years. I accept the Respondent's counsel and the auditor's position that taxpayers have to report income in the year they receive it. Apparently, TRS was unable to pay all of the Appellants' income and/or expenses in 2003 and 2004. There is no provision in the *Act* to permit allocation of some of the amount paid in 2005 to earlier years. Subsection 5(1) of the *Act* provides that:

> … a taxpayer's income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year.

[14] The fact that Mr. Steynor controlled TRS is to be considered. It is important to recognize the separate identity of a corporation. See *Solomon v. Solomon,* [1897] A.C. 22.[8] The Appellants cannot manipulate the corporation to meet their present-day needs. There was no evidence that the Appellants and the Corporation made provision in their 2003 and 2004 returns for unpaid salary and expenses. In 2005, it was too late for retroactive tax planning.

[15] It is understandable if the auditor was frustrated. He was presented with unsupported numbers which the Appellants represented as legitimate expenses.

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7 *Income Tax Act*, definition of "automobile", subparagraph 248(1)*(e)*(ii).

8 Not to be confused with the present Appellant, Norton Solomon.

Mr. Corbett is a meticulous auditor-accountant. He and his colleagues need details to include facts, receipts, witnesses and other corroboration to support that the claimed expenditures were incurred by the Appellants during their employment with TRS and were required and come under those expenditures permitted in sections 6 and 8 of the *Act*.

[16] The Corporation's name appears to be a misnomer "Tax Relief" but no evidence was given to explain what the tax relief was, although this has no effect on my decision.

[17] Unfortunately, the Appellants' facts lacked precision both before the Minister and also before this Court. The numbers, such as the page 2 in the bundle filed as Exhibit A-1 can be reality or fiction – perhaps prepared long after the fact. Dates and amounts alone mean very little. Concrete evidence of expenditures to include receipts and when, where, why, how they were made is of assistance. I am not an auditor and will not guess in deciding what expenses are legitimate business expenses. The Appellants did not meet their burden to establish that the amount allowed by the Minister for the kilometres driven in 2005 to earn income, was unreasonable. I accept the position of the auditor and Respondent's counsel that no increased expenditures for the years in question for both Appellants are allowed.

[18] In conclusion, the Solomon Appeals for the 2003, 2004 and 2005 taxation years are dismissed, and the Thomas Steynor appeal for 2005 is also dismissed. Further, the Thomas Steynor purported appeal for 2004 is quashed.

Signed at Ottawa, Canada, this 24th day of June, 2009.

"C.H. McArthur"

McArthur J.

CITATION:	2009 TCC 320
COURT FILE NO.:	2008-91(IT)I and 2008-92(IT)I
STYLE OF CAUSE:	NORTON SOLOMON and THOMAS STEYNOR and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	December 11, 2008
REASONS FOR JUDGMENT BY:	The Honourable Justice C.H. McArthur
DATE OF JUDGMENT:	June 24, 2009

APPEARANCES:

For the Appellants:	The Appellants themselves
Counsel for the Respondent:	Julian Malone

COUNSEL OF RECORD:

For the Appellant:

Name:	N/A
Firm:	

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada