Docket: 2009-2418(IT)I

BETWEEN:

GUISEPPE COLAVECCHIA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 16, 2010, at Toronto, Ontario

Before: The Honourable Justice T.E. Margeson

Appearances:

Agent for the Appellant:	Alessandro Colavecchia
Counsel for the Respondent:	Ian Theil

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2005 and 2006 taxation years are dismissed, and the Minister's reassessments are confirmed, with costs to the Respondent on a party and party basis.

Signed at Ottawa, Canada, this 9th day of April 2010.

"T.E. Margeson"

Margeson J.

Citation: 2010 TCC 194
Date: 20100409
Docket: 2009-2418(IT)I

BETWEEN:

GUISEPPE COLAVECCHIA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Margeson, J.

[1] For the taxation years 2005 and 2006, the Appellant deducted motor vehicle expenses in the amounts of $4,198.18 and $4,241.78 respectively. These expenses were disallowed by the Minister of National Revenue (the "Minister") and the disallowance was confirmed by notification of confirmation on May 22, 2009. The taxpayer appealed to this Court.

Evidence

[2] Exhibits R-1, A-1 and A-2 were admitted by consent.

[3] The Appellant, during the years in question, was employed by Con-Drain Company (1983) Limited (the "Company"). He was told where to report to work by the foreman. Sometimes he was told by telephone the night before. During the work day he might be told to go to another work site. He used his own vehicle going from home to the job-site.

[4] During the years in question, he had two family vehicles which he used. There was a trailer at the work site which he could use to change his clothes and eat his dinner.

[5] In cross-examination, he agreed with the Minister's presumptions contained in paragraph 8(a), (b), (c), (d), (e), (h) and (i). He disagreed with paragraph 8(f), (j) and (k). With respect to paragraph (g), he said that he would take a shovel or cement if the foreman directed it.

[6] He did not remember the various locations where he worked and the specific dates when he worked but he did recall the various work sites referred to in paragraph 8(d) of the Reply.

[7] He disagreed with paragraph 8(f) and said that he did travel to different work sites in the same day.

[8] He denied that he did not incur the expenses claimed and would not agree that they were his personal or living expenses.

[9] He was a pipe-layer helper. There were five to six people in his group and each one did specific tasks.

[10] He usually drove the Oldsmobile Achieva to work. His wife drove this vehicle as well as the Plymouth Voyager.

[11] The foreman used the trailer to eat in but there was a separate trailer used for company business.

[12] He did not have any receipts for his claimed expenses and said that he had lost them. He used no credit cards, only cash.

[13] He identified his income tax return for 2006 found at Exhibit R-1 at Tab 2. He signed it but did not read it. He signed it because he believed what the bookkeeper did.

[14] With regard to his statement of motor vehicle expenses, he said that some of the figures were minimum figures and some were guesstimates, such as those claimed for gasoline and maintenance.

[15] He gave the bookkeeper a number based upon the small pieces of paper that he kept and then calculated the final figure. He no longer has the pieces of paper.

[16] He identified his statement of motor vehicle expenses for 2005 as found in Exhibit R-1 at Tab 1. He had the declarations read to him.

[17] The information for the employment expenses for that year followed the same format as for 2006. The figures represented minimum guesstimates for the fuel and he relied on the little pieces of paper for the total kilometres driven. Again, he did not have them any longer.

[18] He confirmed the affidavit he swore on March 6, 2008 which was found in Exhibit R-1 at page I-24.

[19] He did oil changes at every 5,000 kilometres and wrote down the mileage. He also changed the oil filter.

[20] Likewise he confirmed the information found in Exhibit R-1 at pages I-25, I-26 and I-27 with respect to his two vehicles. These were referred to as his "log". He confirmed the information at pages I-37, I-38, I-44, and I-45 with respect to maintenance and oil changes on his two vehicles.

[21] He said that the mileage figures referred to looked right. The bookkeeper must have made a mistake in the calculations for kilometres because in his return he claimed 33,000 kilometres and at page I-18 he claimed only 24,005 kilometres. He did not know which one was correct.

[22] The claim for 11,555 kilometres found at page I-34 was about right but that the tax return showed 23,000 kilometres for 2006. The figure of 11,555 kilometres was not correct.

[23] He was referred to Exhibit R-1 at page I-36 where he said that he travelled 15,716 kilometres but he testified that only 4,160 kilometres was for personal use.

[24] When he does an oil change, he writes down the word filter but when shown page I-19 of Exhibit R-1 where the word filter is not indicated, he said that he did not know whether there was an oil change or not and then he said that he could not remember what that entry signified.

[25] He was referred to an entry found in Exhibit R-1 at page I-38 in reference to the Plymouth Voyager under date of December 31, 2006 but the document said that the Plymouth Voyager was scrapped in March of that year.

[26] He agreed that he did not keep a detailed log for every day. He admitted that the mileage figures were not 100% accurate for 2005 and 2006. He could not find the receipts for his oil and filters.

[27] Nunzio Bitondo was the Chief Executive Officer of the Company whose head office is in Cochrane, Ontario. The workers are directed by the Company where they are to work. They have scheduled work. The foreman will call the workers and tell them where they are to work. They are called the day before or the night before.

[28] They have one hundred sites which are mainly in southern Ontario, Orillia, Oshawa and Hamilton. The work sites are owned by third parties.

[29] He referred to Exhibit A-1, Tab 4, which sets out the Company policy regarding the requirement to own a car if you are a Company worker. There are usually two trailers at the work sites, one to be used by the union staff and one to be used by the Company staff. The union staff use the trailer for changing, for storing valuables, and for eating lunch.

[30] In cross-examination, he said that he signed the T-2200s. He sent a letter to the Canada Revenue Agency on January 15, 2008 indicating the Company's policy regarding the necessity of an employee to own a car.

Argument on behalf of the Appellant

[31] The agent for the Appellant argued that there was no need for the workers to go to the Company's normal place of business. He referred to the case of *Chrapko v. Canada*, [1988] 2 C.T.C. 342 (F.C.A.) in support of his position that the deductions sought by the Appellant should be allowed. He concluded that the case stood for the proposition that the intent of paragraph 8(1)(*h*) was to allow employees like Chrapko, who are required to perform their duties in different places, to deduct the cost of travel to such secondary locations as though they were expenses incurred in the course of employment.

[32] He further relied upon the decision of Paris J. in *Rousseau v. Her Majesty the Queen*, 2006 TCC 552, where the Court allowed the expenses to be deducted if the worker was required to carry out his duties at different places.

[33] Further, he relied upon *Royer v. Canada*, [2000] 1 C.T.C. 2688, where Lamarre Proulx J. accepted the reasoning in *Her Majesty the Queen v. Merten*, 90 DTC 6600 (F.C.T.D.) and in *Chrapko* and allowed such expenses on the basis that the Federal Court – Trial Division and the Federal Court of Appeal had modified the words in the statute recognizing the travel to be "in the course of the office of employment".

[34] In respect of the calculations of the expenses, he argued that he had calculated the total kilometres travelled on the basis of Mapquest as to where these work sites were, using the work attendance records of the Company. He also used the average price of gas as obtained from the Minister. He revised the final claim submitted by the Appellant by decreasing it. He also claimed capital cost allowance for the automobiles on the basis of information obtained from the Government website for the value of the automobile and used standard fuel consumption ratings for these automobiles.

[35] This method of calculation is efficient and should be allowed.

[36] The agent argued that the Minister ignored the fact that there was no normal place of business for the Appellant.

[37] The Appellant did report to different places and as such did incur motor vehicle expenses for travelling in the course of his employment.

[38] There was no usual place of work, only a principal place of business to which the employee is not required to go but he is required to go to different places. Therefore, he cannot control his costs. This brings him within the factual situation referred to in *Royer* and therefore within the intentions of Parliament to establish an allowance for those who may be in a position to control the cost of travelling to the principal place of employment, but because they are required to report to different places, are not in the same position.

[39] The appeal should be allowed with costs.

Argument on behalf of the Respondent

[40] Counsel argued that there are two conflicting lines of cases, the *Hogg v. Her Majesty the Queen*, 2002 FCA 177, line of cases and the *Chrapko* line of cases. In the *Hogg* line of cases, a worker must be travelling and working and in the *Chrapko* line of cases the worker does not have to be working.

[41] He referred to *Potter v. Canada*, 2008 TCC 228, where Boyle J. followed the decisions in *O'Neil v. Her Majesty the Queen*, 2000 DTC 2409, which was affirmed in the *Hogg* case by concluding that the phrase travelling in the course of employment involves "the performance of some service as compared to simply getting oneself to the place of work".

[42] In the case at bar, the Appellant confirmed in paragraph 8(e) of the Reply that he was simply getting himself to the work site.

[43] He also relied upon *Daniels v. Canada (Attorney General)*, 2004 FCA 125, where the Federal Court of Appeal established that there must be costs incurred in the course of the taxpayer's duties rather than merely enabling him to perform them.

[44] In *O'Neil*, Rip J., as he then was, stated at paragraph 23:

> 23 … The English cases have drawn a sharp distinction between an expenditure incurred in the performance of the duties of an office or employment and expenditure incurred in order to enable oneself to do the job initially or to enable oneself to perform the duties of that office more efficiently. …

[45] Counsel opined that in *Chrapko* the Court was being charitable in allowing the expenses because it failed to consider the words of the statute when it referred to travelling in the course of employment. He argued that the later cases are more authoritative in requiring the travel to be in the course of employment.

[46] *Royer* was decided one and a half years before *O'Neil* and *McDonald v. Her Majesty the Queen*, 98 DTC 2151, was decided before *O'Neil*.

[47] Counsel obviously disagreed with the decisions in *Rousseau* and *Homsy v. Canada*, [2004] 2 C.T.C. 2871. With respect to *Rozen v. Canada*, [1986] 1 C.T.C. 50 (F.C.T.D.), the *Act* was worded differently. With respect to the calculations of the expenses, counsel said that the odometer readings do not match up with the claimed mileage.

[48] The Respondent, as part of his submissions, referred to the records of the Appellant with respect to oil change records, total miles driven during each period and compared this to the purported driving distances to the construction sites. He used the information provided by the Appellant with respect to both vehicles.

[49] Comparing the odometer readings and records shows thousands of kilometres of personal driving. The odometer readings and estimates are not credible. The assumptions have not been rebutted.

[50] These calculations show that the Appellant did not drive from home to construction sites that he claimed. These records, when dissected, show that the kilometres claimed were not actually driven.

[51] From October 5, 2005 to December 31, 2005, 3,408.1 kilometres were claimed but could not have been driven. Between October 14, 2006 and December 31, 2006, 1,010.8 kilometres claimed were not actually driven.

[52] With respect to the estimated fuel expenses, maintenance costs, insurance costs, licenses and registrations and other costs such as car washes, these amounts claimed by the Appellant have been exaggerated greatly.

[53] In calculating fuel consumption, the Appellant claimed as if it were all city driving by using city driving averages. His driving was not all city driving.

[54] The appeal should be dismissed with costs.

Rebuttal

[55] In rebuttal, the agent for the Appellant said that the *Chrapko* case was intended to come to the aid of workers like the Appellant who had to travel to different work sites and that line of cases should be followed.

[56] There was no normal place of business and therefore the Appellant could not cut down his costs.

[57] The intent of Parliament as outlined by Jerome J. in the *Chrapko* case was to enable the worker to cut back on his travel costs where he was required to travel to many different work sites.

[58] The Appellant did not maintain adequate records, so that estimates were used.

[59] In the revised claim, he did not claim repairs because he did not have receipts.

[60] The Appellant's claims for travel were based upon information provided by the Company. This is a more reasonable way to calculate expenses than by using receipts.

[61] The facts in this case are more in line with those in the *Chrapko* case.

[62] The most important factor was that the intent of Parliament was to allow the Appellant to claim his expenses in these circumstances.

Analysis and Decision

[63] The Minister disallowed the claimed expenses under the provisions of subsection 248(1) of the *Act*, arguing that they were personal or living expenses of the Appellant and therefore he was not entitled to deduct them under paragraph 8(1)*(h.1)* of the *Act*, as they were not incurred in the performance of his duties with the employer but were incurred to travel from home to his workplace. Further, the employee was not ordinarily required to carry out the duties of his employment away from the employer's place of business or in different places.

[64] Paragraph 8(1)*(h.1)* states as follows:

> *(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, …

[65] According to the agent for the Appellant, this creates four requirements that the Appellant must fulfill in order to claim the deductions:

(1) The employee must be required to work away from the employer's place of business or in different places.

The agent contends that this condition has been satisfied.

(2) The employee must be required under the terms of his employment to pay for his employment-related car expenses.

The agent contends that this requirement has been met.

(3) The employer must certify on the prescribed form that these conditions were met.

The agent contends that this requirement has been met as can be seen from the T2200 form submitted.

(4) The expenses must have been incurred for travelling in the course of his employment.

According to the agent, this was the only condition that was not met and that was agreed upon by Ming C. Fu on behalf of the Canada Revenue Agency in his letter dated May 23, 2008.

[66] It has to be noted that the only expenses in issue are those allegedly incurred by the Appellant when travelling from his home to the work place. The evidence indicated that he also travelled from one workplace to another and incurred expenses. However, those expenses are not in issue because the Appellant is not claiming them because he could not establish them.

[67] The Court agrees that the only issue in this case is essentially that set out in condition (4) referred to in paragraph 65 above.

[68] The Court agrees that there are two different lines of cases on this point. One line of cases following the *Chrapko* decision and the other following the *Hogg* decision. The Court does not believe that these cases can be reconciled or distinguished with respect to point four above.

[69] In the *Chrapko* case, the Federal Court of Appeal considered both racetracks to be the normal place of work, even though they were some distance apart. Further, the Court did not refer to "travelling in the course of employment" or "motor vehicle expenses incurred in the performance of the duties of the office or employment". Perhaps as counsel for the Respondent indicated, the Federal Court of Appeal may have been charitable.

[70] This Court can see nothing in the legislation that would indicate the intention of Parliament as outlined in the *Chrapko* case. No evidence was given here to support that position and the section does not speak of a person being in the position of controlling costs of travelling to their principal place of employment because they are required to report to different places. It clearly refers to expenses incurred in the performance of the duties of the office or employment.

[71] This Court finds it difficult to determine that because one has to report to different work sites that that requirement has anything to do with the performance of the duties of the office or employment.

[72] Surely on the facts of the case at bar, the Appellant had not commenced any duty on behalf of his employment until after he has arrived at the first work site, wherever that might be. Until then, he was merely travelling from home to the first place of work for the day.

[73] Clearly these facts parallel those referred to in the *Hogg* case, where the Federal Court of Appeal in referring to the Court's reference in the House of Lords in *Ricketts v. Colquhoun*, [1926] AC 1, concluded that the expenses incurred by the taxpayer in travelling to and from his home to his place of work were not expenses incurred in the course of the taxpayer's performance of his duties but rather expenses incurred to allow him to perform his duties.

[74] Further at paragraph 13 of the *Hogg* decision, the Federal Court of Appeal said:

> 13 Thus, in my view, a plain reading of both the French and English texts of paragraph 8(1)*(h.1)* of the *Act* makes it clear that the words "motor vehicle expenses incurred for travelling in the course of the office…" necessarily require that these expenses be incurred by the taxpayer while performing the duties of his office.

[75] Clearly, in the case at bar, when the taxpayer was incurring the expenses in issue, he had not commenced any duty on behalf of the employer.

[76] Recently, Boyle J., in the *Potter* case above, concluded at paragraph 11 that:

> 11 … These cases make it clear that traveling in the course of employment necessarily involves the performance of some service as compared to simply getting oneself to the place of work. In this case, there is no evidence or suggestion that Mr. Potter took any crew or supplies with him to Fort McMurray for the benefit of his employer.

[77] In the case at bar, there was no evidence that the taxpayer was doing anything apart from travelling from home to his place of work, wherever that might have been, and at those times he was not performing any service for his employer.

[78] This finding is sufficient to dispose of this appeal but the Court will also consider the second aspect of the case dealing with the adequacy of proof of the amounts expended.

[79] The evidence of the Appellant in that regard was wholly unsatisfactory. His records were incomplete, inaccurate, and based on presumptions, at best. He obviously made claims for amounts in excess of what he might have been entitled to if he were successful on the first issue and such evidence brings into question whether any of his evidence can be relied upon.

[80] The agent tried valiantly to calculate his expenses on a more objective basis, but his calculations as well were based to a large extent upon what the Appellant told him and therefore his results cannot be accepted as proof of the total value of expenses claimed.

[81] The Appellant has not rebutted the presumptions contained in the Reply and they must stand.

[82] The appeal is dismissed and the Minister's reassessment is confirmed.

[83] The Respondent is entitled to his costs, to be taxed on a party and party basis.

Signed at Ottawa, Canada, this 9th day of April 2010.

"T.E. Margeson"

Margeson J.

CITATION:	2010 TCC 194
COURT FILE NO.:	2009-2418(IT)I
STYLE OF CAUSE:	GUISEPPE COLAVECCHIA and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 16, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice T.E. Margeson
DATE OF JUDGMENT:	April 9, 2010

APPEARANCES:

Agent for the Appellant:	Alessandro Colavecchia
Counsel for the Respondent:	Ian Theil

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