

Docket: 2009-551(EI)

BETWEEN:

CAT BROS. OILFIELD CONSTRUCTION LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

ALDERIC CATELLIER,

Intervenor.

Appeal heard on common evidence with the appeal of
Cat Bros. Oilfield Construction Ltd., 2009-552(CPP)
on March 30, 2010, at Edmonton, Alberta

Before: The Honourable Justice T.E. Margeson

Appearances:

Agent for the Appellant:	Pierre Catellier
Counsel for the Respondent:	Robert Neilson and David Lynass (Student-at-law)
For the Intervenor:	The Intervenor himself

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is dismissed, and the decision of the Minister of National Revenue on the appeal made to him under section 92 of the *Act* is confirmed.

Signed at New Glasgow, Nova Scotia, this 21st day of May 2010.

“T.E. Margeson”

Margeson J.

Docket: 2009-552(CPP)

BETWEEN:

CAT BROS. OILFIELD CONSTRUCTION LTD.,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

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Appeal heard on common evidence with the appeal of
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Appearances:

Agent for the Appellant:	Pierre Catellier
Counsel for the Respondent:	Robert Neilson and David Lynass (Student-at-law)
For the Intervenor:	The Intervenor himself

JUDGMENT

The appeal pursuant to section 28 of the *Canada Pension Plan* is dismissed, and the decision of the Minister of National Revenue on the appeal made to him under section 27.1 of the *Plan* is confirmed.

Signed at New Glasgow, Nova Scotia, this 21st day of May 2010.

“T.E. Margeson”

Margeson J.

Citation: 2010 TCC 287
Date: 20100521
Docket: 2009-551(EI)
2009-522(CPP)

BETWEEN:

CAT BROS. OILFIELD CONSTRUCTION LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

ALDERIC CATELLIER,

Intervenor.

REASONS FOR JUDGMENT

Margeson J.

[1] The Minister of National Revenue (the “Minister”) assessed the Appellant for employment insurance premiums in the amount of \$1,377.58 for the taxation year 2004 in respect of seventeen workers of Cat Bros. Oilfield Construction Ltd. (the “Company”) for the 2004 taxation year.

[2] The Minister further assessed the Appellant, for the taxation year 2004, for employment insurance premiums in the amount of \$475.09 in respect of Melody McBride and Jude Rodrigue.

[3] The Minister further assessed the Appellant for employment insurance premiums in the amount of \$2,713.03 for the taxation year 2005, in respect of seventeen other workers.

[4] The Minister further assessed the Appellant for Canada Pension Plan contributions in the amount of \$2,433.20 for the 2004 year, for those individuals listed in Schedule “A” attached to and forming part of the Reply to the Notice of Appeal.

[5] The Minister further assessed the Appellant for Canada Pension Plan contributions in the amount of \$46.61 for the 2004 taxation year, in respect of Jude Rodrigue.

[6] The Minister further assessed the Appellant for Canada Pension Plan contributions in the amount of \$6,018.72 for the 2005 year, in respect of the individuals listed in Schedule “B” attached to and forming part of the Reply to the Notice of Appeal.

[7] These assessments were confirmed on appeal and the Appellant filed an appeal to this Court and Alderic Catellier filed a Notice of Intervention.

Evidence

[8] Melody McBride testified that the Company rented a truck from her on a daily basis and she carried fuel and oil, tow ropes, shovels and wrenches on the truck. She also drove workers to the job site. Sometimes other employees used her truck for the Company.

[9] She was paid a rental fee of \$75 per day and \$17 per hour for travel and fuel. She bought the fuel, which averaged out to about \$50 per day. It cost her about \$250 per month to service her truck.

[10] In cross-examination, she said that she was employed by the Company during the relevant period of time. She was a labourer and operator. When she was a labourer, she did not use the truck every day for the Company.

[11] The most important use of the truck was to obtain materials for the jobs. They worked throughout central Alberta, within a time radius of one and one-half hours. She used her truck all of the time for the Company when she was an operator. Other workers used her vehicle with her permission to perform work for the Company. She had no receipts when she bought fuel for her truck and she kept no receipts for maintenance. She did “keep track” of when she used the truck for work.

[12] Her truck was never used by the Company when she was not working. It was not insured for rental. She never discussed the rental income or expenses for the truck. She used her truck to get to work.

[13] In re-direct, she said that she was paid a further \$20 per hour when she used her truck to haul machinery around the work-site.

[14] Alderic Catellier was an operator for the Company. He used his truck in his work. He was paid \$60 per day and received payment for his fuel. In 2004, he was paid \$14,000.

[15] He carried supplies and pulled machinery and utility trailers for the Company.

[16] His truck was used all day when he was operating and other workers used it for the Company, and he was paid for that at the rate of \$20 per hour. The company also rented his truck out to others at a rental fee.

[17] In cross-examination, he said that he was employed by the Company in the years 2004 and 2005. He did not keep any receipts for the Company but he kept a record of the number of hours that his truck was used for the Company.

[18] The other labourers would use his truck a couple of times per week, with his permission. He used it to go back and forth to work and to deliver workers to the job site.

[19] His truck was not insured for rental. He did not claim expenses for the truck on his income tax return or the money he received from the Company for the use of his truck.

[20] Pierre Catellier testified that he rented trucks from the normal employees. He paid \$20 per hour for them and paid for the fuel. The trucks were used for pulling machinery and equipment and to obtain parts for the jobs. When he rented out the employees' trucks, he charged double the rates that he paid the employees.

[21] It cost him about \$1,000 per month for repairs on his trucks. It would cost him \$2,200 per month to rent a truck from a rental agency and about the same in payments if he bought a truck.

[22] In cross-examination, he said that he owned 60% of the shares of the Company. He and his brother were directors. He had knowledge of the practices of the Company.

[23] He was referred to the Replies to the Notices of Appeal and said that the persons listed in Schedule "C" were employees of the Company in 2004 and 2005.

[24] The operators and labourers were paid a set rate for the use of their vehicles. There were different rates depending on the use of the truck. No receipts were kept

for expenses related to the trucks but a record was kept of the number of hours the truck was used. The Company was invoiced each day for the trucks.

[25] He assigned the workers' trucks to others without the consent of the owners. There were no contracts between the Company and the truck owners.

[26] In response to questions from the Intervenor, he said that not all workers received the same allowance rates, contradicting paragraph 7(i) of the Reply to the Notice of Appeal. He also contradicted paragraph 7(k) of the Reply to the Notice of Appeal.

[27] In response to the presumption contained in paragraph 7(u), he said that he believed that he had a right to assign the workers' trucks to others.

[28] The Respondent called Allan Dahl, who had been employed by the Company in 2004, 2005 and 2006. He was an equipment operator who used his truck to get to work, deliver fuel, and carry tools for repairing equipment.

[29] He was paid \$100 per day for the use of his truck. He gave the Company no receipts for his fuel. He did keep a time sheet for the use of his truck. The Company could not assign his truck without his permission. His truck was not insured for rental. He claimed his truck income and expenses as part of his farming operation.

Argument on behalf of the Respondent

[30] Counsel for the Respondent said that there were two issues to be decided:

- (1) Were the payments for the trucks rental payments or allowances?
- (2) If they were allowances, were they a reasonable allowance?

[31] His position was that they were an allowance and that they were reasonable.

[32] He referred to the case of *Arnett & Burgess Oil Field Construction Ltd. v. Minister of National Revenue*, 2002 CarswellNat 1074 (T.C.C.). The facts were similar to the present case where the Court decided that the trucks were not rented to the employer. As here, the use of the trucks was tied to the employment. The employer offered the workers employment and paid them a per diem if they used their trucks. The trucks were not put at the general disposition of the employer.

[33] There, as in the case at bar, there was no sort of interim possessing interest in the trucks passing to the employer so that they might make whatever use of them as they seem fit. The owners had to give their permission to the employer to use the

trucks. Therefore, the payments, in both cases were on allowance and are governed by paragraph 6(1)(b) of the *Income Tax Act* and subsection 2(1), paragraph 5(1)(a) and section 93 of the *Employment Insurance Act*, section 2 of the *Insurable Earnings and Collection of Premiums Regulations* and section 2, subsection 6(1), sections 12 and 27.2 of the *Canada Pension Plan*.

[34] These sections define payments that are includable and not includable. In the case at bar, the payments were predetermined for the use of the trucks at the discretion of the workers who did not have to account to the employer for expenses. These payments were an allowance and were includable under paragraph 6(1)(b) of the *Income Tax Act* unless the amounts were reasonable.

[35] However, because the amounts were not based solely on the number of kilometres for which the vehicles were used in connection with or in the course of the office or employment are deemed not to be reasonable under paragraph 6(1)(b)(vii.1) and (x).

[36] Therefore, the amounts are taxable, insurable and pensionable.

[37] In *Arnett & Burgess Oil Field Construction Ltd.* above, the Court concluded that the presumption was a rebuttable one. Counsel takes issue with this finding and argues that there are no grounds for such a conclusion when you consider the appropriate section.

[38] He relied upon the decision in *Yates v. R.*, 2009 FCA 50, [2009] 3 C.T.C. 183 (F.C.A.), and in particular at paragraph 37 of that decision.

[39] However, even if the deeming provisions are rebuttable the onus is on the taxpayer to prove that the allowance was reasonable. Here the taxpayers did not include the allowance in their income.

[40] In the case of *Yates* above, the Minister did find the amounts to be reasonable and allowed their deduction so that the presumption was rebutted in that case.

[41] The presumption has not been rebutted here.

[42] The appeal should be dismissed.

Argument by the Appellant

[43] The Appellant said that if he leased the vehicles they would cost more and if he bought them they would cost more.

[44] He did not consider the payments to be an allowance but a rental that he paid for the vehicles. He had his own insurance coverage on the vehicles while they were being used by the Company.

[45] He did not believe that the vehicle owners should be taxed on the payments. If the workers did not have trucks, he would have leased them elsewhere.

[46] As far as basing the payments on kilometres driven, that formula would not work for the Company. The trucks were being used to haul heavy machinery.

[47] He believed that there was a rental arrangement in effect and the payment was not an allowance. He did not know any other way to do it.

Argument by the Intervenor

[48] The intervenor said that he was not permitted to include his truck earnings in his income in addition to his income.

[49] The company would ask me if it could use the truck before it used it. If you rent a truck from a rental agency, you are not permitted to use it for any purpose that you choose.

Analysis and Decision

[50] As indicated by counsel for the Respondent, there are two issues in this case:

- (1) Were the payments paid to the employees rental payments or allowances under the relevant statutory provisions?
- (2) If the payments were allowances, were they reasonable?

[51] There is only one conflict in the evidence adduced and that is whether or not the Company had to seek the permission of the truck owners before it used their trucks for Company purposes.

[52] The evidence of Pierre Catellier on this issue was not convincing. In direct testimony, he said that he had a right to assign the trucks to others without the owner's permission. In response to questions about the presumptions contained in the Reply to the Notice of Appeal at paragraph 7(u), he said that he believed that he had the right to assign the trucks to others.

[53] This evidence was contradicted by the evidence of Melody McBride who said that other workers used her truck with her permission. Likewise, Alderic Catellier

testified that other workers would use his truck a couple of times per week with his permission. Allan Dahl also said that the Company could not assign his truck without his permission. The Court is satisfied that the Company could not assign any of the trucks without the owner's permission.

[54] The Court is satisfied that the trucks were not rented by the workers to the Appellant. As in the case of *Arnett & Burgess Oil Field Construction Ltd.* above, the use of the trucks was tied to the employment of the workers. The Company offered the truck owners employment and paid them a per diem if they used their trucks in the course of their employment or if the Company used their truck when driven by other workers.

[55] The Court is satisfied that the trucks were not in the general disposition of the Company. There was no interim possessory interest in the property passing to the Appellant so that it might make what use of the truck it saw fit, as in the case of *Arnett & Burgess Oil Field Construction Ltd.* above. Therefore the per diem paid to the owners was properly classified as "an allowance" under paragraph 6(1)(b) of the *Income Tax Act*.

[56] Further, the Court is satisfied that the allowance was not based solely on the number of kilometres for which the vehicle was used in connection with or in the course of the office or employment of the workers and under subparagraph 6(1)(b)(x) it is deemed not to be a reasonable allowance.

[57] In the case of *Tri-Bec Inc. v. R.*, 2002 CarswellNat 4349 (T.C.C.), Lamarre Proulx J. said at paragraph 19 of her decision:

19 Subparagraph 6(1)(b)(x) of the *Income Tax Act* is clear in my view. Since section 174 of the *Act* refers to this statutory provision, a reasonable allowance for the use of a motor vehicle is one that is fixed on the basis of the number of kilometres travelled by the taxpayer in the performance of the office or employment.

This Court accepts that position.

[58] That same decision was reached in *Beauport (Ville) v. Canada (Minister of National Revenue – M.N.R.)*, 2001 FCA 198, [2002] 2 C.T.C. 161 (F.C.A.).

[59] The Court can perceive nothing in the wording of subparagraph 6(1)(b)(x) that would allow it to conclude that the requirement creates a rebuttable presumption that can be met by the giving of appropriate evidence. The meaning of the section is clear and unambiguous.

[60] In the event that the section created a rebuttable presumption as referred to the *Arnett & Burgess Oil field Construction Ltd.* case, the Court is satisfied that no satisfactory evidence was given in this case that would allow the Court to conclude that the amount was reasonable.

[61] The appeal is dismissed and the Minister's decision is confirmed.

Signed at New Glasgow, Nova Scotia, this 21st day of May 2010.

“T.E. Margeson”

Margeson J.

CITATION: 2010 TCC 287

COURT FILE NO.: 2009-551(EI) and 2009-552(CPP)

STYLE OF CAUSE: CAT BROS. OILFIELD CONSTRUCTION LTD. and THE MINISTER OF NATIONAL REVENUE and ALDERIC CATELLIER

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: March 30, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice T.E. Margeson

DATE OF JUDGMENT: May 21, 2010

APPEARANCES:

Agent for the Appellant:	Pierre Catellier
Counsel for the Respondent:	Robert Neilson and David Lynass (Student-at-law)
For the Intervenor:	The Intervenor himself

COUNSEL OF RECORD:

For the Appellant:	N/A
For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada
For the Intervenor:	N/A