Docket: 2002-4174(IT)G

BETWEEN:

GORDON PRICE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on November 24, 25, 26, 2010 and
June 14, 15, 16 and 17, 2011 at Ottawa, Ontario

By: The Honourable Justice C.H. McArthur

Appearances:

Counsel for the Appellant:	Frances M. Viele
Counsel for the Respondent:	Charles M. Camirand

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 1995, 1996, 1997, 1998, 1999 and 2000 taxation years are allowed and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

i) The amounts of income attributable to flights outside of Canada by the Appellant are:

Vancouver to Toronto 31%
Toronto to Vancouver 49%

ii) The Minister's calculation for other international flights is accepted. The time and distance in Canadian air on flights to Shannon Ireland, London England and those taking a similar route is 168 minutes and 1229 miles.

iii) The disability payments received by the Appellant are taxable in Canada as calculated by the Minister - $8,500 in 1999 and $17,500 in 2000.

iv) As conceded by the Respondent, the remuneration in respect of deadheading for the return flights to and from Winnipeg is allocated as agreed.

v) Applying the Respondent's concession, remuneration for training in 2000 is not taxable in Canada. All remuneration not related to specific duties are as previously determined by the Minister.

No costs are awarded.

Signed at Ottawa, Canada, this 12th day of October, 2011.

"C.H. McArthur"

McArthur J.

Citation: 2011 TCC 449
Date: 20111012
Docket: 2002-4174(IT)G

BETWEEN:

GORDON PRICE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

McArthur J.

[1] These appeals are from assessments of the Minister of National Revenue increasing the Appellant's allocation of his Canadian income for the 1995, 1996, 1997, 1998, 1999 and 2000 taxation years. He was a non-resident of Canada during the relevant years, living in Bermuda. Pursuant to subparagraph 115(1)(*a*)(i) of the *Income Tax Act*, ("*Act*") taxable income earned in Canada by a non-resident person is remuneration from duties of employment performed by the non-resident person in Canada. No tax treaty exists between Canada and Bermuda and his income earned outside of Canada is not taxable in this country.

[2] The question is what part of his Air Canada ("A/C") income is taxable in Canada?

[3] The Appellant, formerly a senior pilot (Captain), challenges the Minister's methodology in calculating the Canadian allocation of his A/C income. There are some 40 other A/C pilots with similar appeals. This has been referred to as a test case although so was *Sutcliffe v. Her Majesty the Queen*[1] which preceded it. It is conceded, that at all relevant times, the Appellant (retired), was a non-resident of Canada within the meaning of the *Act*.

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[1] 2006 DTC 2076.

[4] During the first three days of the hearing in November 2010, the parties believed they had settled the issue with respect to international flights yet some details were later disputed. For the most part, the issues narrow down to the income allocation for domestic flights (primarily Toronto, Vancouver and return) and for non-specific duties such as remuneration during vacations, sickness, deadheading and other non-flying items.

[5] The facts include that the Appellant was a Canadian citizen but a resident of Bermuda during the relevant years – 1995 to 2000 inclusive. He and his wife moved there in 1993. All his flights both international and domestic originated in Canada, primarily from Toronto. As a senior pilot he was able to choose his routes of travel which were, for the most part, international. To determine his Canadian taxable income, an allocation must be made between the duties performed inside and outside Canada. In the years 1995 to 2000 inclusive he received the following income from A/C: $175,000, $202,000, $196,000, $212,500, $215,500 and $261,000, respectively.

[6] In the previous decision, Mr. Sutcliffe was an A/C pilot who also appealed the Minister's allocation of his income. His claim for non-residency status was also not challenged. Unlike in the present case, allocation for international flights was more seriously challenged. Domestic flights and non-flying duties were also dealt with in *Sutcliffe.*

[7] In 1999, Mr. Price received $17,000 in disability income of which $8,500 was attributed to his Canadian income. Similarly, he received $34,500 in 2000 and $17,500 was allocated to disability income in Canada. He contends that, as a non-resident, none of this income should be considered Canadian income.

[8] The Minister takes the position that regardless of the airspace flown in, income in respect of domestic flights is income earned in Canada. Many flights such as Toronto-Vancouver and Toronto-Montreal fly in part over U.S. airspace.

[9] The terms of the Appellant's employment were set out in an agreement (the "contract")[2] negotiated between A/C and the A/C Pilots' Association. The Appellant was remunerated for flying time on a per-minute basis which is set out in

[2] The words agreement and contract refer to the employment document at Exhibit R-2, Tab 16.

Schedules A to F in the Minister's Reply to the Notice of Appeal. It does not serve a useful purpose in these reasons to review the agreement in great detail.

[10] The Appellant spent a minimum of 15 minutes in Canada on all flights on pre-flight, departure, landing and taxiing procedures as part of his duties of employment. In addition to receiving remuneration for flying time, he was also remunerated for deadheading[3] for which income was allocated according to the departure and termination points of the deadhead flight. He was also remunerated for stand by duty which was allocated to the respective flight and for training which was allocated according to the location where the training took place.

[11] Further, he was paid for sick leave, vacation time, displacement, bank time and other benefits as more particularly described in the contract, in respect of which no specific duties are performed. The income which was allocated on the same proportional basis as income received by him in respect of actual duties performed. He was also remunerated in respect of other incidental amounts including Duty Pay Guarantee, Trip Hour Guarantee and Overseas Operations Pay. These amounts are apportioned to the flights to which they pertain.

[12] Initially, this hearing commenced and continued on November 24, 25 and 26, 2010 when it was adjourned to give the parties the opportunity to obtain necessary information from NavCanada ("NavCan")[4] with respect to obtaining domestic flight times over U.S. airspace and to permit the preparation of a mathematical formula which might resolve the domestic issue. There was a mountain of data records to be condensed into useable percentages with the hope that the parties could arrive at reasonable allocations.

[13] For the most part, the present disagreement between the parties is the allocations of the U.S. and Canadian flying time for the Appellant's flights between Toronto and Vancouver and the allocation of non-flying duties while awaiting a return flight from an international location. I believe the Appellant's position is that almost 90% of his flights between Toronto and Vancouver[5] were over U.S. air. The

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[3] The expression "deadheading" describes flights taken by the Appellant as a passenger to a flight departure location.

[4] NavCan is a non-profit corporation which keeps extensive records of points of entry and exit from Canada on every international flight.

[5] Toronto-Vancouver includes the return Vancouver to Toronto.

Minister arrives at a far lesser percentage using averages from A/C flight plan records.

[14] As stated, in addition to the Toronto-Vancouver allocation, the second and very substantial issue is the between flights allocation which the Appellant estimates at 70% of his duties away from home.[6] Under the heading "Reasons, the Appellant Intends to Rely On" from the Amended Notice of Appeal, the Appellant includes:

> 2. The Minister disregarded the real or actual place of employment and earning activity in this case. In making the assessment or reassessment, the Minister relied on fiction or unreasonable and unfair assumptions. The Appellant asserts that generalized assumptions, such as the new allocation method, can only be rationally applied where the real or actual facts are not known or knowable; assumptions are never a substitute for real or actual facts.
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> 3. The allocation method and criteria are not rationally connected to their purpose. Applying them artificially generates more income taxable in Canada. The relative weight given to the various employment functions is made without rational or justifiable reasons.

[15] The hearing of the appeals began in November 2010 for three days, and continued for four days in June 2011. The parties reached agreement on some issues yet had to re-argue them during the June hearing. It was a relatively difficult hearing.

[16] At the end of the hearing, counsel for the parties provided the following issues which they wished addressed:

a) Which method of allocation is more reasonable to determine the Appellant's income earned in Canada? How should the present case be handled in light of the *Sutcliffe* decision?

b) Which portion of Toronto-Vancouver and Vancouver-Toronto flights were flown over Canada? Is the testimony of the NavCan witness admissible?

c) Are the disability payments taxable in Canada?

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[6] This is the period awaiting his return to Canada a flight from an overseas location which he suggested averaged approximately 48 hours.

d) For international flights, what method should be used, minutes or the distance flown over Canada?

e) Should the Court recommend that the Minister waive the calculation of interest on unpaid takes? Was the reassessment of the Appellant fair after a six-year delay from the Notice of Objection.

I will deal with these issues in order.

(a) Method of allocation

The Respondent's method of allocation

[17] The Respondent's method of allocation for the most part follows *Sutcliffe*, the facts of which are very similar to the present case. Prior to *Sutcliffe*, the income allocated to international flights was not subject to Canadian income tax and the income allocated to domestic flights was subject to Canadian income tax. An international flight was understood to be a flight that departed from or arrived at a place outside Canada, regardless of whether most of or a portion of the flight was over the Canadian territory. A domestic flight was one that departed from and arrived in Canada, regardless of whether most of or a portion of the flight was over a territory outside Canada.

[18] In *Sutcliffe*, Woods J. departed from this method and decided that the income earned by a non-resident pilot from a Canadian airline employer should be allocated and taxed as follows:

- The income earned by the pilot in respect of the portion of a domestic flight flown in Canadian airspace is income earned in Canada.

- The income earned by the pilot in respect of the portion of an international flight flown in Canadian airspace is income earned in Canada;

- The income earned by the pilot in respect of remuneration paid by the airline company that is not related to specific duties, such as vacation and sickness pay, should be allocated on a pro-rata basis to duties performed in Canada.

The income earned in Canada is determined by the time spent by the pilot in Canadian airspace. She uses the following assumptions to calculate the time spent in Canadian airspace:

- average flight paths are determined as the most direct route between the point of origin and the destination using conventional navigation (e.g. great circle routes);

- distance in Canada is computed by distance from the point of origin (or destination) to (or from) the point on the border or in territorial waters where the flight leaves (or enters) Canada, which is determined from the average flight path;

- the distance for the flight path is from data received from a Canadian airline, and was cross-referenced to an independent third-party source;

- time in Canada is determined by dividing the distance in Canada by airspeed; and

- airspeed is the average airspeed throughout the flight determined by reference to the distance and minutes for the flight as indicated by the airline.

The Appellant's method of allocation

[19] The Appellant strongly disagrees with the Respondent's allocation method. He distinguishes the facts in *Sutcliffe* from this case. Firstly, that Mark Sutcliffe was a first officer and later a first year captain who flew primarily DC9 and A320 planes mainly in Canada and the U.S. On the other hand, the Appellant was a 30-year captain who flew larger planes (747 and Airbus 340), mainly to overseas destinations. He states that Mark Sutcliffe flew short haul flights, flying probably to a point in Canada or a point in the U.S., and frequently returning to the Canadian place of origin the same day. The Appellant flew long haul flights, resulting in his being away from his home for days and was performing duties out of the country that were in furtherance of his employment.

[20] The Appellant asks the Court to take into consideration that a more senior captain on a larger plane going faster at longer distances has a different job and different duties than junior pilots flying a smaller plane to a relatively close destination, either in Canada or in the U.S. He believes his duties were different from *Sutcliffe* and his allocation must, therefore, be different.

[21] He repeatedly testified that his conditions of employment often required him to be away from home for several days between flights and that during this non-flying period he was on-duty. Those duties included flight management, receiving instructions from authorities, safety management, liaising with employer, risk management, crew management, dealing with reports and updates, and his review and maintenance functions. He contends that resting is a duty of employment because of employment regulations. He adds that he is the manager of his aircraft from the time it leaves to the time it returns to Toronto so that 70% of his duties were performed outside of Canada between flights.

[22] The following example, which is not based on actual flight data, illustrates his methodology.

Prepared for the Court's assistance by the Appellant.

International flight – facts	
Departure from Toronto on Monday at 9:00 am Arrival to Toronto on Wednesday at 9:00 am	
Time of total flight (flying time)	10 hours
Time of flight over Canada	5 hours
Time away from base / Time performing duties	48 hours (not Canadian income)[7]
Remuneration for flight	$10,000 [8]

In the example, the flight leaves from Toronto at 9:00 a.m. on a Monday and comes back to Toronto at 9:00 a.m. on a Wednesday. The Appellant is gone 48 hours overseas. The actual flying time is 10 hours recorded by A/C. The time of the flight over Canada is five hours. This data is provided by Canada Revenue Agency ("CRA") and calculated as explained above. Although the Appellant disagrees with

[7] My insertion

[8] The Minister agrees that this table is a helpful illustration (prepared by the Appellant as an example of his theory for calculation). The Respondent acknowledged that this chart reasonably outlines the Appellant's submissions.

the use of flight paths and averages to establish those numbers, he adopted them for the purpose of applying his method. The time away from base or the time performing duties is 48 hours. This is based on the time of the departure and the time of return and the remuneration for the flight is $10,000.

Comparing Methods

Appellant's method	
Duties in Canada	5 hours
Time away from base / time performing duties	48 hours
% allocation to Canada	10.4%
Income allocated to Canada	$1,040 from a total of $10,000

Respondent's method	
Duties in Canada	5 hours
Time of flight / time performing duties	10 hours
% allocation to Canada	50.0%
Income allocated to Canada	$5,000

[23] Both parties arrive at a different allocation of income in Canada with the same facts simply because the Appellant considers that he was on-duty in Canada only five of the 48 on-duty hours. CRA considers that he was on-duty in Canada for five hours but only on a total of 10 hours since only the time spent flying is taken into consideration and not the time between flights spent perhaps in the far east or Europe or other location outside of Canada. The Appellant states he left Toronto Monday morning for work and came back 48 hours later, meaning that he worked 48 hours for his employer, A/C, and only five hours should be Canadian income.

[24] He was required by his employer to remain in the location of his destination to fulfill the duty above mentioned and this was a condition of employment. He agrees that he was earning a salary yet the consequence is that the salary is income and the earning of that income accrues on a daily basis throughout the entire period that it is earned, including off-flying period.[9]

[9] The Appellant appears to be ignoring the employment agreement (Exhibit R-2, Tab 16).

Analysis

[25] Woods J. applied the principle of Bowman J. in *Sumner v. The Queen.*[10] In considering different methods of apportionment, a judge should apply the most reasonable method. He stated as follows:

> [24] In this case the employer itself has made an allocation using the gross-receipts method and while this is not binding and gives rise to no estoppel it is at least prima facie evidence of an attempt to make a reasonable allocation. The situation might well be different if Mr. Sumner were not an employee and his employer had not made an allocation. If one were attempting to determine the income from the business of putting on rock concerts in different countries I should think that expert accounting evidence would be of great assistance. It may well be that the operations in one country yielded a loss and in another a profit. The question of the allocation of head office overhead should also be dealt with. I do not wish this judgment to be taken as sanctioning one method over another. I can see problems in both methods, and other allocation formulae may be appropriate. My decision in the case of Mr. Sumner is based solely on the fact that it has not been established that the time method is more reasonable or appropriate than that used by the Minister. Therefore Mr. Sumner's appeal is dismissed.
>
> [Emphasis added]

[26] It is not sufficient for the Appellant to establish that the Minister's apportionment is inaccurate, he must provide the Court with a more reasonable method than that accepted in *Sutcliffe*.

[27] The theory of the Appellant does not stand after an analysis of the agreement negotiated between A/C and the Pilot's Union. A/C paid its pilots for the flying minutes and not for the period between flights. The collective agreement contains a very specific and precise method to calculate the remuneration of pilots. The Appellant was paid for flying time on a per-minute basis. His income was calculated based upon a rate that is multiplied by flight minutes. Subject to paragraph 17.11, he was compensated for duties performed by him only during the on-duty period, which is defined in the contract as commencing one hour prior to the scheduled departure time or at the required reporting time, whichever is earlier, and ending 30 minutes after the termination of the flight.[11]

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[10] 2000 DTC 1667 (T.C.C.).

[11] See section 17.04 of the agreement found at Exhibit R-2, Tab 16.

[28] Being away from home on layovers might be a condition of employment, but the pilot was paid based on flight time only. Even if it is a condition of employment, it does not mean it is a condition of employment for which the pilot is remunerated. Moreover, it is unreasonable to give the same value to an hour spent flying an aircraft with an hour at a hotel in Tokyo or elsewhere and this does not appear to be the intention of the parties to the collective agreement.

[29] There is a provision for remuneration for layovers in section 17.11 of the contract as follows:

> .02 **Trip Hour Guarantee -** In the case of trips which involve legal layover(s) away from home base, a pilot shall be guaranteed one (1) hour of flight time credits and pay for each four (4) actual hours of trip hour time, prorated. Trip hour shall be counted from the time a pilot is required to report to the airport at his home base prior to operating a flight or actual reporting time, whichever is later, to the time a pilot is released from duty thirty (30) minutes after arrival at his home base for a legal rest.
>
> > .01 Any trip hour special credit will be calculated for pay purposes as an extension of the last portion of the final trip except where a combination of Overseas and Domestic flight legs are involved; in which case the ratio of Overseas/Domestic flight legs are involved; in which case the ratio of Overseas/Domestic Trip hour time will be calculated as a percentage of the total Trip hour guarantee.

[30] Trip hour guarantee provides additional income to pilots who spend time away from their home base during layovers. A/C attributed it to the pilots in the form of extra minutes added to the last portion of the return trip.

[31] Finally, there is no mention in the written agreement of the off-flying duties that the Appellant refers to. While recognizing inconsistencies with his methodology and the letter of the contract, he explained that his duties were going beyond the contract and suggested my favouring the legal doctrine of substance over form. The contract does not provide for the off-flying payment the Appellant is requesting. Substance over form cannot be used to alter the clear text of the contract.

[32] Even accepting that the Appellant's income was salary the definition of salary[12] cannot be interpreted as implying that off-flying hours are work hours or

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[12] *Black's Law Dictionary*, 7th ed., s.v. "salary" (an agreed compensation for services - esp. professional or semi-professional services - i.e. paid at regular intervals on a yearly basis as distinguished from an hourly basis).

have the same value.[13] The agreement defines on-duty period as commencing one hour prior to the scheduled departure time and ending 30 minutes after the termination of the flight.[14] Further section 17.05.02 provides that A/C will plan a suitable downtown location for layovers longer than (14) hours. The requirement of rest during lengthy layovers and off-duty periods is recurrent at sections 17.05.03 and 17.05.04.

[33] I conclude that the most reasonable method is the one which reflects the pay structure contained in the contract of employment. This is consistent with the decision in *Austin v. The Queen*.[15] *Austin* was a non-resident Canadian Football League (CFL) quarterback who played three games out of 18 in the U.S. in 1994 and four games in 1995. He spent six days in 1994 in the U.S. and eight days in 1995 while playing for his Canadian team. The issue was whether his income was calculable on a per day percentage basis as presented by the Minister or on a per game basis as submitted by the Appellant. I concluded that Mr. Austin's approach was more reasonable because he was essentially paid on a per game basis pursuant to his employment contract and he was not paid for unplayed games. The Appellant's situation of being paid per flying minutes is analogous to the situation of Mr. Austin.

(b) <u>Apportionment - Toronto to Vancouver and return.</u>

[34] During closing argument, the Appellant referred to paragraphs 35 and 36 of *Sutcliffe* and argued that they apply equally to the present case. Woods J. wrote:

> **35** For the appellant, several Air Canada pilots and a dispatcher testified. In general, they described the Agency's methodology as being grossly oversimplified, based as it is on the idea of "average flight paths" and speeds which are essentially fictional. It also does not take into account delays in either take offs or landings.
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> **36** According to the testimony, pilots are presented with flight plans prepared by dispatchers prior to the departure of a flight. The dispatchers use a computerized system for calculating the shortest distance between two points modified with reference to restricted airspace, weather patterns, and the jet stream. Those flight plans inevitably change once the flight has begun due to changes in weather and wind

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13 Woods J. qualifies the remuneration of Mark Sutcliffe as a salary at paragraph 140.

14 This is contrary to the Appellant's position.

15 2004 TCC 6.

> patterns. Fuel is very expensive, so taking advantage of tail winds and avoiding head winds is important to routing. The pilots testified that the actual flight path and time of each flight is inherently unpredictable as a result of these variables. As a result, the Agency's methodology was highly artificial, according to the pilots.

[35] The flight paths recorded by NavCan are provided by A/C. They indicate the route, the speed and when the plane crosses the border. The flight path is the most efficient way to travel from point A to point B according to A/C. It takes into consideration different elements such as weather, jet stream and even volcano eruptions, if applicable. NavCan has no knowledge of whether the actual flight path was followed by the pilot. According to the Respondent's witness a deviation from the flight plan is rare, but he does not exclude that it can happen. To the contrary, the Appellant testified that he was in control of his aircraft and was entitled to deviate from the original flight path. A rapid change of weather can trigger a change in the path. He argues that the Respondent's method is based on assumptions and does not take into consideration the actual flying circumstances. Although he testified that approximately 90% of the Vancouver flights were flown over U.S. territory, he accepted the 31%-49% *Sutcliffe* apportionment.

[36] To alleviate any misunderstanding, I will deal with this issue in more detail. As far as it goes, I accept the testimony of the NavCan witness. I find it of assistance in understanding the data upon which the Minister based his assessments. The Appellant agrees with much of the testimony of the NavCan witness although he objected to the evidence on the basis that it was hearsay because the NavCan witness was not the person who drew up the flight path. I find that the numbers and the flight path details provided by the witness are admissible because the witness was qualified to interpret the flight document. The specific paths he referred to belonged to the Appellant which was less than 50% over U.S. airspace on Vancouver-Toronto, Toronto-Vancouver flights.

[37] The Appellant also offered evidence that, not only is the pilot entitled to follow a path deviating from the given flight path, but that pilots do so in most flights.[16] I believe the Respondent was seeking a ruling to the effect that the flight paths recorded by NavCan are a fair representation of what is happening in the reality and that the CRA could always rely on the numbers provided by NavCan in order to assess the pilots. While the flight paths may be a fair representation of reality and represent the most reasonable conclusion, pilots may often vary these paths and we

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[16] I find this difficult to accept although perhaps the Appellant was including insignificant deviations.

have no hard evidence as to the frequency and extent. To establish that a flight path is a fair estimation of the actual route followed by a pilot, further and corroborating evidence is required such as the testimony of A/C pilots.

[38] Based on the testimonies of the Appellant and the NavCan witness, I find that the amounts of income reasonably attributable to duties of employment performed outside of Canada by the Appellant is 31% and 49% for the Toronto-Vancouver connection. This is somewhat arbitrary yet it is supported by the following: i) these percentages are somewhere between the positions of the Respondent and the Appellant and ii) they are the percentages that Woods J. arrived at in *Sutcliffe*[17] which appear more reasonable than that presented by either party.

[39] The Respondent's counsel submitted that we cannot take the findings from *Sutcliffe* and apply them to the present case because they are based on different evidence. We have the numbers given by the Respondent based on NavCan flight paths and those based on the Appellant's testimony. While I have difficulty accepting that the Appellant almost never followed the flight paths, yet we have no corroborated testimony to the contrary. I cannot conclude that the flight paths provided by NavCan are an accurate reflection of the route actually taken by the Appellant all or mostly all of the time. He, at least partially, refuted the Minister's assumptions with respect to the flights Toronto-Vancouver and Vancouver-Toronto. Woods J. heard evidence of A/C pilot Sutcliffe and perhaps other pilots, for the same air path. In a context where I have no clear indication as to which percentage is the appropriate one, the findings of Woods J. are compelling. There is no better methodology presented.

c) <u>Disability payments</u>

[40] Section 26.03.03 of the contract stipulates that the monthly premium for the disability income insurance plan is paid by A/C. These disability payments to pilots who are Canadian residents are taxable pursuant to paragraph 6(1)(*f*) of the *Act*. Pursuant to section 115 of the *Act*, the payment to a non-resident such as the Appellant is taxable in Canada.

[41] He contends that the disability payments he received in the years 1999 ($17,112) and 2000 ($34,655) should not be taxed in Canada because he was a

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[17] Subsequent judgment to the main Sutcliffe decision, see *Sutcliffe v. Canada*, 2006 TCC 581.

non-resident. He referred to the decision of *Blauer v. Canada*[18] heard under the Court's informal procedure. Mrs. Blauer resided and was employed in Canada before becoming disabled and leaving for Israel. As a non-resident, she received wage loss replacement payments from a Canadian insurance company. The employer was paying the insurance premium. The presiding Judge concluded the following:

> I agree with the Appellant's argument. The language of subparagraph 115(1)(a)(i) does not include all payments that are employment income when earned by a non-resident but rather it includes only a certain type of employment income; namely, income from the performance of the duties of an office or employment. There is no ambiguity. That provision should not be taken to include other categories of employment income such as the WLR payments (i.e. disability insurance benefits) irrespective of their inclusion for residents by virtue of section 6. The essence of such payments is not that they are consideration for services rendered. They are disability insurance benefits not income from duties performed. If the legislative intent was to be more inclusive under Part I of the Act, an intent that is far from clear to me, Parliament, not this Court, must address that concern. For all these reasons I am allowing the appeal in respect of the WLR payments.

With respect, I find the Minister's position more convincing. The expression "income from duty of employment of offices and employments" should be given a broad meaning as stated in *Sutcliffe* as follows:

> 128 Although income such as sickness and vacation pay are received because of sickness and vacation in the sense of accruing during these periods, the remuneration is also received because the employee has agreed to perform services for the employer. The appellant would not be entitled to any sickness or vacation pay if he had not agreed to perform duties as a pilot.
>
> 129 The only reasonable interpretation of subparagraph 115(1)(a)(i) in my view is that the appellant's remuneration that accrues during off-duty periods, including statutory vacation pay, is from duties performed. The essence of the relationship between an employee and employer is that services are rendered in consideration of payment for those services.
>
> 130 The connection between remuneration paid and services rendered enables employers to deduct remuneration paid and requires employees to be taxed on it. I reject the argument of the appellant that some portion of the remuneration has no income-earning nexus in Canada.
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> [Emphasis added]

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[18] 2007 TCC 706.

[42] An income is taxable in Canada pursuant to section 115 of the *Act* as long as a nexus can be established with the performance of a duty in Canada. Further, the word "income" in sections 115 and 3 of the *Act* should be given a broad meaning. See *The Queen v. Savage.*[19] Section 115 of the *Act* makes a specific reference to section 3 of the *Act*. Any material acquisition which confers an economic benefit to the taxpayer such as a disability payment, constitute an income for the purpose of sections 3 and 115 of the *Act*.

[43] Finally, paragraph 6(1)(*f*) of the *Act*, provides that income from private employment insurance plan benefits under which the taxpayer's employer has made a contribution is taxable. The Federal Court of Appeal in *Hurd v. R.*[20] held that:

> 6 Since subparagraph 115(1)(*a*)(i) specifically refers to section 3, which is a part of Division B relating to the computation of income of a taxpayer for a taxation year and since section 7 is part of subdivision a of Division B, it is clear to me that for purpose of subparagraph 115(1)(a)(i) regard must be had to section 7 in the computation of income of a non-resident. It seems, then, that the sole question requiring resolution is whether the benefit received was a benefit arising from the duties of his employment with the company performed by him in Canada before he left this country in 1971.

[44] A non-resident must also consider sections 5 through 8 of the *Act* in calculating Canadian income.

(d) International flights

[45] The Appellant adopted the numbers of the Respondent for international flights, however, he used a somewhat arbitrary time calculation. The Respondent's method divided the distance by the average air speed to obtain the minutes.

[46] The Appellant submits there is an inconsistency in the Respondent's method because the international calculations were done based on distance. The Minister divides the distance in Canada based upon average flight paths by the average air speed of the flights to obtain the time of flying in Canada for international flights. For all flights going to Europe, the Minister assumes the distance over Canada is 1,229 miles. Based that mileage and average air speed of the flight, he established the time flown in Canada concluding that the Canadian air time between London (LHR) and

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19 [1983] 2 SCR 428.

20 [1982] 1 F.C. 554.

Toronto (YYZ) is 168 minutes. For the flight between Shannon, Ireland (SNN) and Toronto (YYZ), the time flown in Canada is 132 minutes. The discrepancy between those connections is due to a different in average air speed. For unknown reasons, the Shannon-Toronto plane has a greater air speed.

[47] The Appellant contends that his calculation method is more reasonable because the flight paths are changing depending on many factors so there is no way to identify the actual air speed of the plane. He used the same amount of minutes for flights going in the same area of the world. He reasons that a trip from London to Toronto is much the same as a trip from Shannon to Toronto (1,229 miles) so the time flown in Canada should be the same for both flights. He chose the shorter period which is 132 minutes rather than the Respondent's 168 minutes. He believes time is the relevant factor if pilots make efficient use of the winds the plane will arrive at its destination faster and if the plane is flying faster over Canada, then there are fewer duties accomplished in Canada.

[48] His position has some merit although the discrepancy between the two methods is minimal. He adds that if an assumption is made that all flights to Europe follow the same route and all flights travel the same distance over Canadian land, which is 1,229 miles for a flight from Toronto to Europe, it is reasonable to make the same assumption for the time.

[49] The problem with the Appellant's calculation method, even if logical, is deciding upon which basis 132 minutes should be preferred over 168 minutes. The Respondent's method gives a disappointing result which is a different time flown in Canada for the same distance, but at least this difference is based on the fact that the flight path has recorded different average speeds for different destinations. It might not be the most accurate basis, but it has rationality. In any event, in terms of assessment dollars, the effect of implementing one method over the other is minimal.

[50] Moreover, an allocation method that is based on average flight paths and not flight specific is more reasonable in this context. I agree with Woods J. who stated that such a method is reasonable and desirable (see paragraphs 69, 86 and 87 of the *Sutcliffe* decision). I chose the Respondent's calculation because it is based on actual flight paths. The Appellant's 132 minutes is uncorroborated and perhaps self-serving.

(e) Interest

[51] The Appellant submits that it is unfair to be charged interest over the six year plus period it took the Minister to respond to his Notice of Appeal. This is not a

Court of equity and I have no jurisdiction to waive penalty or interest pursuant to subsection 220(3.1) of the *Act* unless it was inaccurately calculated. The Appellant did not advance evidence to the effect that the Minister did not proceed with due dispatch or acted unfairly and the Minister did not have the opportunity to refute such an argument.

General Comments

[52] It would be a blessing to bring an end to all the endless maneuvering. I would venture to say that all A/C pilots are Canadian citizens that they receive salary income from their Canadian employer. Their place of employment is Canada and that their home base is Canada from where their flights start and end.

[53] Many have quite legally taken advantage of the *Income Tax Act,* particularly section 115, to substantially reduce their Canadian tax liability by becoming non-residents of Canada. This is entirely within the ambit of the legislation. A problem arises with the overly aggressive maneuvering to arrive at the lowest possible percentage for duties performed in Canada and for other amounts such as disability payments.

[54] To compensate, the Minister overreacts. Perhaps it is time for the legislature to say enough is enough and set a firm percentage for non-resident A/C pilots. What makes the present situation even worse is the complex agreement between A/C and the Pilots Association. My obligation is to interpret and apply the legislation as it presently exists. I cannot change the law but do make a gratuitous suggestion.

[55] There is a serious need for a simpler method. Perhaps the legislature should set out the apportionment of income for non-resident pilots in a simple standardized scheme. For example, for A/C pilots who are non-residents of Canada, having, say, 60% of their total income from A/C designated as taxable Canadian income and the remaining 40% designated non-taxable foreign income. It is beyond comprehension that there be a variance between 90% and less than 50% for the U.S. portion of flights over U.S. air. Presently, the most reasonable method of allocation is found in *Sutcliffe*.

[56] I conclude that:

i) The amounts of income attributable to flight duty of employment performed outside of Canada by the Appellant on the Vancouver-

Toronto connection is 31% and 49% for the Toronto-Vancouver connection.

ii) The disability payments are taxable in Canada following the Respondent's method.

(iii) The calculation of the Respondent for international flights based on average air speed is reasonable.

(iv) Following the Respondent's concessions, the remuneration in respect of deadheading for the Vancouver-Winnipeg and Winnipeg-Vancouver connections are to be allocated with the same pro rata formula as the rest of the income for the year.

(v) Finally the remuneration in respect of the training in 2000 should be considered as not taxable in Canada as conceded by the Respondent during trial.

(vi) I reject the Appellant's contention that 70% of his income for international flights should be allocated to the time, approximately 48 hours spent abroad awaiting the return to Canada.

(vii) No costs are awarded.

Signed at Ottawa, Canada, this 12th day of October, 2011.

"C.H. McArthur"

McArthur J.

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