Docket: 2010-3405(IT)I

BETWEEN:

MYRON C. STOGRIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on August 24, 2011, at Kelowna, British Columbia.

Before: The Honourable Justice Robert J. Hogan

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Zachary Froese

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2006 and 2007 taxation years is allowed in part, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to an additional deduction of $1,020 and $1,224 for the 2006 and 2007 taxation years respectively, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 22nd day of November 2011.

"Robert J. Hogan"

Robert J. Hogan

Citation: 2011 TCC 532
Date: 20111122
Docket: 2010-3405(IT)I

BETWEEN:

MYRON C. STOGRIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hogan J.

[1] This appeal is from reassessments issued by the Minister of National Revenue (the "Minister") for the 2006 and 2007 taxation years.

I. FACTS

[2] In all relevant years, Myron C. Stogrin (the "Appellant") was employed by a transport company as a long-haul truck driver. He was remunerated at a rate of $0.40 per mile and certain driving expenses, e.g., fuel, were covered by the employer. His typical expenses while away on long trips for deliveries and pickups were for meals and showers, as he slept in his truck most of the time.

[3] He traveled from places such as Vancouver and the Okanagan in B.C. to Tampa, Fla., Charlotte, N.C. and New York, N.Y. Canadian law mandates maximum driving times of 70 hours per week and 15 hours per day, followed by a mandatory break of 48 hours, but the Appellant was required to stay with the rig even during downtime to prevent fuel or goods from being stolen.

[4] Mr. Stogrin was audited for 2004, 2005, 2006 and 2007 but he brought separate appeals for 2004-2005 and 2006-2007. As regards the instant appeal, for 2006 and 2007, he was reassessed using the simplified method for calculating expenses as he had not retained his receipts. The Appellant disagreed with the 50 percent limit on his meal and lodging deductions imposed by section 67.1 of the *Income Tax Act* (the "*Act*") and believed that the Court had discretion to allow a greater deduction or could petition the Minister on his behalf, through this appeal, to change the law. He attempted to claim the full amount of his daily meal and lodging expenses and not just the 50 percent allowed by the Minister. He based his claim in part on the assertion that government employees received a much higher per diem for lodging, meal and travel expenses.

[5] The Appellant claims he had encountered difficulties in dealing with the Canada Revenue Agency (the "CRA") in this and another case and faced unwarranted delays in attempting to resolve this case.

II. ANALYSIS

Income Tax Act

[6] The *Income Tax Act* provides as follows:

> ***Income Tax Act***
>
> **8(1) Deductions allowed** — In computing a taxpayer's income for a taxation year from an office or employment, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto:
>
> . . .
>
> **(*g*) Transport employee's expenses** — where the taxpayer was an employee of a person whose principal business was passenger, goods, or passenger and goods transport and the duties of the employment required the taxpayer, regularly,
>
> (i) to travel, away from the municipality where the employer's establishment to which the taxpayer reported for work was located and away from the metropolitan area, if there is one, where it was located, on vehicles used by the employer to transport the goods or passengers, and
>
> (ii) while so away from that municipality and metropolitan area, to make disbursements for meals and lodging,

amounts so disbursed by the taxpayer in the year to the extent that the taxpayer has not been reimbursed and is not entitled to be reimbursed in respect thereof;

(*h*) Travel expenses — 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 the travel expenses incurred by the taxpayer in the performance of the duties of the office or employment,

amounts expended by the taxpayer in the year (other than motor vehicle expenses) for travelling in the course of the office or employment, except where the taxpayer

(iii) received an allowance for travel expenses that was, because of subparagraph 6(1)(*b*)(v), (vi) or (vii), not included in computing the taxpayer's income for the year, or

(iv) claims a deduction for the year under paragraph (*e*), (*f*) or (*g*);

. . .

(2) General limitation — Except as permitted by this section, no deductions shall be made in computing a taxpayer's income for a taxation year from an office or employment.

. . .

(4) Meals — An amount expended in respect of a meal consumed by a taxpayer who is an officer or employee shall not be included in computing the amount of a deduction under paragraph (1)(*f*) or (*h*) unless the meal was consumed during a period while the taxpayer was required by the taxpayer's duties to be away, for a period of not less than twelve hours, from the municipality where the employer's establishment to which the taxpayer ordinarily reported for work was located and away from the metropolitan area, if there is one, where it was located.

. . .

67.1(1) Expenses for food, etc. [or entertainment] — Subject to subsection (1.1), for the purposes of this Act, other than sections 62, 63, 118.01 and 118.2, an amount paid or payable in respect of the human consumption of food or beverages or the enjoyment of entertainment is deemed to be 50 per cent of the lesser of

(*a*) the amount actually paid or payable in respect thereof, and

(*b*) an amount in respect thereof that would be reasonable in the circumstances.

(1.1) Expenses for food and beverages of long-haul truck drivers — An amount paid or payable by a long-haul truck driver in respect of the consumption of food or beverages by the driver during an eligible travel period of the driver is deemed to be the amount determined by multiplying the specified percentage in respect of the amount so paid or payable by the lesser of

(*a*) the amount so paid or payable, and

(*b*) a reasonable amount in the circumstances.

. . .

(5) Definitions — The following definitions apply for the purpose of this section.

. . .

"specified percentage" in respect of an amount paid or payable is

(*a*) 60 per cent, if the amount is paid or becomes payable on or after March 19, 2007 and before 2008;

(*b*) 65 per cent, if the amount is paid or becomes payable in 2008;

(*c*) 70 per cent, if the amount is paid or becomes payable in 2009;

(*d*) 75 per cent, if the amount is paid or becomes payable in 2010; and

(*e*) 80 per cent, if the amount is paid or becomes payable after 2010.

Canadian Charter of Rights and Freedoms

[7] The *Canadian Charter of Rights and Freedoms* (the "*Charter*") provides as follows:

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

. . .

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

. . .

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

. . .

(*b*) to be tried within a reasonable time;

. . .

(*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

. . .

Equality before and under law and equal protection and benefit of law

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[8] *Information Circular* 73-21R9 "Claims for Meals and Lodging Expenses of Transport Employees" (applicable for 2006 and 2007) describes the two methods of calculating deductions accepted by the CRA. According to the CRA, the **detailed method** requires anyone who claims a deduction to maintain a record book detailing:

- the date the expense was paid;
- the time the trip started and ended;
- the geographical location (e.g., name of the town);
- the name of the restaurant or hotel where the amount was paid;
- the type of expense; and
- the amount paid.

[9] The recorded expenses will be allowed to the extent that they are reasonable and supported by vouchers, i.e., receipts. These expenses are subject to the 50 percent limitation in section 67.1 of the *Act*.

[10] The **simplified method**, on the other hand, merely requires the transport employee to maintain a record of his or her trips actually taken during the taxation year. There is a flat rate per meal of $17 to a maximum of $51 for three meals per day, without any need to produce receipts for, or proofs of the expenditures. This is, again, subject to the 50 percent limitation or to a higher limitation in prescribed circumstances.

[11] As a preliminary matter, the Appellant argued that the reassessments should be vacated on the grounds that the Respondent failed to deal with the matter in a timely manner. The Appellant also raised *Charter*-based arguments against the reassessments.

[12] In *Rahey (C.R.) v. M.N.R.*,[1] this Court dismissed an application to vacate an assessment on the basis that the near decade-long delay in having the case heard was so unreasonable as to have violated the Appellant's rights under section 7 and paragraph 11(*b*) of the *Charter*. In addressing the paragraph 11(*b*) argument, the Court stated:

> . . . In my view, section 11 of the Charter has no application in cases of this sort. The respondent in assessing tax and penalties did not charge the appellant with an offence within the meaning of the Charter. . . . Nothing said in *Wigglesworth v. The Queen*, [1987] 2 S.C.R. 541, supports a contrary view, that is to say a view that an assessment of a penalty under subsection 163(2) of the *Income Tax Act* involves a prosecution of an offence in a civil or criminal proceeding. . . .[2]

[Emphasis added.]

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[1] [1990] 1 C.T.C. 2272.
[2] *Ibid.* at p. 2273.

[13] The Court also quickly dismissed the section 7 argument, stating that it does not protect property rights and that "no frailty in proceedings taken to collect the tax (if any such frailty exists) can justify vacating the assessment of tax itself."[3]

[14] In *Bolton v. R.*,[4] the Federal Court of Appeal considered the effect of the Minister's failure to consider the taxpayer's assessment "with all due dispatch" as required by section 152(1) of the *Act*. The Federal Court of Appeal concluded as follows:

> . . . Parliament clearly did not intend that the Minister's failure to reconsider an assessment with all due dispatch should have the effect of vacating such assessment. If the Minister does not act, the taxpayer's recourse is to appeal pursuant to section 169 . . . .

[15] In *Kasaboski v. R.*,[5] Bowie J. explains the policy behind the use of the simplified method:

> While it has no legal foundation, the Minister's willingness to accept meal claims by transport employees on the so-called simplified basis is a recognition of the injustice that would result if claims were to be totally denied if the taxpayer could not produce a corroborating log. The $33.00 per day that he allows is a recognition of what I consider to be a truism — a taxpayer should never benefit from a failure to keep proper records. . . . It is generally true, however, that taxpayers who estimate their expenditures are more likely to overestimate them than to underestimate them.[6]

[16] Several cases have established that the fact that public servants travelling on government business receive a per diem that is higher than the meal and lodging deduction permitted by section 67.1 is not a violation of a person's rights under the *Charter*.

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[3] *Ibid*. at p. 2276.
[4] [1996] 3 C.T.C. 3 at pp. 4-5.
[5] [2005] 3 C.T.C. 2370, 2005 TCC 356 (Informal Procedure).
[6] *Ibid*. at para. 11.

[17] In *Smith v. Canada*,[7] truck drivers representing each province and the Yukon Territory brought a class action against the Federal Government claiming that they and all other non-government workers who travel for a living should be allowed deductions at the same rate as government employees who travel on business. They sought to have section 67.1 of the *Act* struck down as a violation of section 8 and subsection 15(1) of the *Charter*.

[18] Beames J. addresses the question of the inequality created by section 67.1 of the *Act* as follows:

> 5 . . . Most employees in Canada are not permitted any deduction from their income for meal expenses. However, s. 8(1)(g) of the *Income Tax Act* provides that transport employees whose duties of employment require regular travel outside the municipality where the employer is located and where they report to work, and who are required to incur expenses for meals and lodging which are not reimbursed by the employer, may deduct meal expenses.
>
> 6 Section 67.1 of the *Income Tax Act* provides that all deductions in respect of meals shall be deemed to be 50 percent of the lesser of the amount actually paid and the amount that would be reasonable in the circumstances. Section 67.1 has general application to meal and entertainment expenses, and it is not limited to the meal expenses of truck drivers or transport workers.
>
> . . .
>
> 9 As the defendants' counsel said in submissions, the plaintiffs are not just trying to compare apples and bananas; they are seeking to compare apples and monkeys. The federal government, as an employer, enters into employment contracts with its employees. That one of the terms of its employment contracts relates to meal allowances does not entitle the plaintiffs, who are employed by other employers, to say that they are entitled in some way to a deduction for tax purposes equivalent to the federal government employment contract allowance. As Bowie J. said in *Kasaboski v. R.*, 2005 TCC 356 . . .
>
> > Allowances paid to public servants are established as a term of their employment. They are not at all relevant to the matter before me...they certainly cannot establish an entitlement to a deduction from income not found in the *Act*.

[7] 2005 BCSC 1036, [2005] 4 C.T.C. 97.

> 10 The federal government is not obliged to confer a tax benefit on any particular group. Truck drivers are, in fact, the recipients of a tax benefit that is not available to all Canadians, namely, that they can, if eligible, deduct meal expenses at 50 percent of either actual expenditures, capped only by what is reasonable, or a flat rate of $15 per meal or $45 per day. If a truck driver had claims of $75 for meals, supported by receipts, and Canada Revenue Agency took the position that the amount was not reasonable, then perhaps some comparison between that position and the federal government employee allowance might be warranted. However, it is illogical to compare the tax benefit of the deduction allowed to truck drivers to meal allowances granted to government employees.

These conclusions were affirmed on appeal to the British Columbia Court of Appeal. That court dismissed the appeal on the grounds that "tax deductions cannot be compared with employment benefits."[8]

[19] Two fairly recent cases in this Court stand out as dealing with similar facts and arguments to those in the present case. Both were decided under the informal procedure.

[20] In *Kozmeniuk v. R.*,[9] the appellant, Ms. Kozmeniuk, was a long-distance transport driver who did not maintain receipts or records for his meal expenses and chose to claim a deduction based on the simplified method. Mr. Kozmeniuk appealed a reassessment disallowing his claimed meal and lodging expenses above the $45 per day maximum. He had claimed $54 per day, including meals eaten at his home base, arguing, in essence, that civil servants were allowed $54 per day and so should he.

[21] This Court began its reasoning by pointing out that "[a]n overriding problem in this appeal is the lack of receipts" and that the appellant chose to use the simplified method. [10] It concluded that $45 per day or $15 per meal was reasonable and that if the Appellant had had receipts as factual evidence to establish a higher deduction, the Court would have allowed it.

[22] In the 2009 case of *Neault v. The Queen*,[11] the appellant again was employed as a long-distance truck driver. For the 2004 taxation year, Mr. Neault opted to use the simplified method and did not keep his meal receipts. The Court explains at paragraph 6:

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[8] 2006 BCCA 237, [2006] 4 C.T.C. 73, at para. 6.
[9] [2006] 2 C.T.C. 2356, 2006 TCC 65 (Informal Procedure).
[10] *Ibid.* at para. 3.
[11] 2009 TCC 586, 2009 DTC 1383.

> I cannot allow Mr. Neault any amount greater than the $45 daily maximum permitted by the simplified method and used by the CRA in reassessing his 2004 tax year. If Mr. Neault wanted to claim more he could have followed the detailed vouchered and logged method that income tax law otherwise requires. While the Treasury Board amounts for meal allowances may show that $45 is not the maximum reasonable amount that could be deducted by a taxpayer, it cannot help Mr. Neault's claim unless he can show in evidence that he spent more than $45 each day and that each day qualified. This he did not do.

III. CONCLUSION

[23] There is no question that during the relevant taxation years Mr. Stogrin incurred, as a transport employee, unreimbursed meal and lodging expenses while away from the municipality in which his employer was located as is required for the deduction in paragraphs 8(1)(*g*) and (*h*) of the *Act*.

[24] Section 8 and subsection 15(1) of the *Charter* were relied on to argue that the application of the simplified method is unfair. The cases in this area establish that the limitation in section 67.1 of the *Act* does not give rise to a seizure or create a distinction that, by its purpose or effect, violates the *Charter*.

[25] Like the appellants in *Smith*, *supra*, and *Gaudet v. the Queen*[12], the Appellant alleges that he is being discriminated against on the basis of his employee status. He contends that he should receive a tax deduction that would produce a tax saving roughly equivalent to the economic benefits enjoyed by government employees with respect to similar expenses. This argument has failed before the Supreme Court of Canada. Section 67.1 has been repeatedly affirmed to be fair in light of the *Charter*.

[26] Thus, the CRA has not discriminated against Mr. Stogrin by applying the limitation to his meal and lodging deductions claimed under section 67.1 of the *Act*. His arguments based on the *Charter* fail for the reasons noted in the above-cited cases. The deductions calculated for Mr. Stogrin's 2006 and 2007 tax assessments after applying the limitation should stand. I note, however, that counsel for the Respondent wrote to the Court after the trial to concede that the Appellant is entitled to deduct further employment expenses of $1,020 and $1,224 for the 2006 and 2007 taxation years respectively, pursuant to sections 8 and 67.1 of the *Act*. These amounts represent 40 more days of travel.

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[12] [1997] T.C.J. No. 11 (QL), [1998] 2 C.T.C. 2652.

[27] For the reasons noted above, the appeal is allowed in part only and the matter is referred back to the Minister for reconsideration and reassessment on the basis that the Appellant is entitled to additional deductions of $1,020 and $1,224 for the 2006 and 2007 taxation years respectively.

Signed at Ottawa, Canada, this 22nd day of November 2011.

"Robert J. Hogan"

Robert J. Hogan

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COURT FILE NO.:	2010-3405(IT)I
STYLE OF CAUSE:	MYRON C. STOGRIN v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Kelowna, British Columbia
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APPEARANCES:

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