Docket: 2017-2932(IT)I

BETWEEN:

TERRY McEACHERN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 17, 2018, at Miramichi, New Brunswick.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Dominique Gallant

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2014 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Kingston, Canada, this 11th day of December 2018.

"Rommel G. Masse"

Masse D.J.

Citation: 2018 TCC 232
Date: 20181211
Docket: 2017-2932(IT)I

BETWEEN:

TERRY McEACHERN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Masse J.

[1] The Appellant has launched this appeal from a Notice of Reassessment for his 2014 taxation year.

[2] He seeks to have excluded from his taxable income the amount of a benefit called an Attraction and Retention Allowance (the "Allowance") that his employer, Diavik Diamond Mines Inc. ("DDMI"), paid to him in order to offset personal travel costs between his home in New Brunswick and DDMI's pick-up point in Edmonton, AB.

[3] A bit of background information is in order. During the 2014 taxation year, the Appellant was employed by DDMI at the Lac de Gras Mine site in the Northern Territories. However, at all material times, the Appellant maintained a principal residence in Tabusintac in the province of New Brunswick. The Appellant worked on a rotating schedule, two weeks-on and two weeks-off. His on-time was spent at the mine site and his off-time was spent at his principal residence in New Brunswick.

[4] When the Appellant went to work, he traveled from his residence in New Brunswick to Edmonton, Alberta which is a pick-up point for DDMI employees. From there, DDMI paid for an airline charter to pick up employees and transport them to Yellowknife and to the remote mine site. According to the terms of employment as set out in the *Schedule of Compensation, Benefits & Employment Conditions*, it is the Appellant's responsibility to pay his travel costs

to and from his principal residence and DDMI's pick-up point in Edmonton. However, DDMI paid to the Appellant the Allowance of 4.5% of the control point of his pay band in order to help pay for these travel costs. It is specifically stated in the *Schedule of Compensation, Benefits & Employment Conditions* that this Allowance is "to ensure the company remains competitive in attracting and retaining key management, professional and technical personnel to the long-term sustainability of DDMI Operations." It is also further specifically stated:

> For all employees with their principal residence outside of the Northwest Territories or West of Kitikmeot, DDMI covers the cost of the airline charter from Yellowknife, NT, to the Mine Site for each rotation. There is a realization that many of our southern employees are required to travel from their home residence to Edmonton, AB, and these employees must cover the costs of travel and accommodation in order to take advantage of the Company charter. To help offset these personal costs your Attraction and Retention Allowance will be 4.5% of the control point of your Pay Band.

[5] Therefore, employees must cover the costs of travel and accommodation between their home and the pick-up point in Edmonton. The Allowance is a benefit paid by DDMI to its employees to help offset these personal costs.

[6] In the 2014 taxation year, this Allowance amounted to $5,749.70 for the Appellant. However, the actual costs incurred by him to travel between his home in New Brunswick and the pick-up point in Edmonton totalled $10,383.40 – a sum far greater than the amount of the Allowance. The Appellant received a T4 Statement of Remuneration paid by his employer for the 2014 taxation year. The amount of the Allowance, being $5,749.70, was included in the Appellant's remuneration and was taxable as such. The DDMI never certified a *Declaration of Exemption – Employment at a Special Work Site* (Form TD4) and never confirmed that the Allowance paid could be excluded from the Appellant's income. In the absence of a duly completed Form TD4, the amount of the Allowance paid by DDMI to the Appellant was a benefit that had to be included in his taxable income.

[7] The Appellant attempted on several occasions to convince DDMI to complete and issue to him a Form TD4 in order to remove the Allowance from his taxable income but DDMI would not do so. DDMI was of the view that the Appellant met the requirements for the remote work location exemption in connection with the work done by him at the mine site. That is why DDMI did not include in the Appellant's income the transportation costs between the pick-up point in Edmonton and the work site as well as the value of the board and lodging

that were provided to him at the mine site. DDMI was of the view that the Allowance did not qualify for the remote work location exemption. In order to be excluded from income, the Allowance had to be reasonable. DDMI was of the view that the Allowance was not reasonable since it was calculated as a percentage of base salary rather than on an estimate of travel expense. The Allowance bore no resemblance at all to the employee's travel costs and was thus not reasonable. It is clear to the Court that the determination of the quantum of the Allowance was arbitrary and not in any way related to the actual costs of travel.

[8] In addition, DDMI was of the view that Form TD4 is to be used when an exemption for work at a special work site is claimed under subparagraph 6(6)*a*)i) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (the "*Act*") and not when claiming an exemption under the remote work location exemption under subparagraph 6(6)*a*)ii) of the *Act* which is the exemption for which the Appellant qualified.

[9] The only issue for the Court to determine is whether or not the Minister of National Revenue properly determined that the Allowance paid by DDMI to the Appellant should be included in the Appellant's taxable income for the 2014 taxation year.

Theory of the Appellant

[10] The Appellant argues that the Allowance that he received from DDMI should be exempt from his taxable income based on his work at a remote work location at a mine in the Northern Territories. He spends much more in flights to get to his point of pick-up per year than he receives from the Allowance paid by DDMI. The Appellant submits that DDMI was unreasonable in failing to provide a Form TD4. A TD4 should have been provided and therefore the Appellant urges the Court to rule in his favour and decide that the Allowance should be tax deductible even in the absence of a TD4.

[11] The Appellant therefore indicates that his appeal be allowed.

Theory of the Respondent

[12] The Respondent submits that the Appellant's Allowance was properly included in taxable income because DDMI did not provide a TD4, *Declaration of Exemption – Exemption at a Special Work Site*. The absence of a duly completed TD4 form is a necessary requirement before the Allowance can be excluded from taxable income. Furthermore, the Allowance was based on a percentage of the

Appellant's salary without regard to how far an employee has to travel to the pick-up point and without regard to the actual costs incurred. As such, this allowance is more of an incentive or a bonus rather than a travel allowance. In addition, the Appellant chose to live in the province of New Brunswick instead of closer to the pick-up point – that was his personal choice. Therefore, the Allowance that was paid by DDMI to the Appellant is a benefit that must be included in taxable income pursuant to subsection 6(1) of the *Act* and it cannot be excluded from taxable income pursuant to subsection 6(6) of the *Act*.

[13] The Respondent therefore indicates that the appeal should be dismissed without costs.

Legislative Provisions

[14] The relevant provisions of the *Act* are as follows:

> Amounts to be included as income from office or employment
>
> **6** (1) There shall be included in computing the income of a taxpayer for a taxation year as income from an office or employment such of the following amounts as are applicable
>
> > Value of benefits
> >
> > **(a)** the value of board, lodging and other benefits of any kind whatever received or enjoyed by the taxpayer, or by a person who does not deal at arm's length with the taxpayer, in the year in respect of, in the course of, or by virtue of the taxpayer's office or employment, […]
> >
> > Personal or living expenses
> >
> > **(b)** all amounts received by the taxpayer in the year as an allowance for personal or living expenses or as an allowance for any other purpose, […]
> >
> > **….**
>
> Employment at special work site or remote location
>
> (6) Notwithstanding subsection 6(1), in computing the income of a taxpayer for a taxation year from an office or employment, there shall not be included any amount received or enjoyed by the taxpayer in respect of, in the course or by virtue of the office or employment that is the value of, or an allowance (not in

excess of a reasonable amount) in respect of expenses the taxpayer has incurred for,

(a) the taxpayer's board and lodging for a period at

(i) a special work site, being a location at which the duties performed by the taxpayer were of a temporary nature, if the taxpayer maintained at another location a self-contained domestic establishment as the taxpayer's principal place of residence

(A) that was, throughout the period, available for the taxpayer's occupancy and not rented by the taxpayer to any other person, and

(B) to which, by reason of distance, the taxpayer could not reasonably be expected to have returned daily from the special work site, or

(ii) a location at which, by virtue of its remoteness from any established community, the taxpayer could not reasonably be expected to establish and maintain a self-contained domestic establishment,

if the period during which the taxpayer was required by the taxpayer's duties to be away from the taxpayer's principal place of residence, or to be at the special work site or location, was not less than 36 hours; or

(b) transportation between

(i) the principal place of residence and the special work site referred to in subparagraph 6(6)(a)(i), or

(ii) the location referred to in subparagraph 6(6)(a)(ii) and a location in Canada or a location in the country in which the taxpayer is employed,

in respect of a period described in paragraph 6(6)(a) during which the taxpayer received board and lodging, or a reasonable allowance in respect of board and lodging, from the taxpayer's employer.

Analysis

[15] Generally, all benefits received or enjoyed by an employee from an office or employment are taxable in the hands of the employee. An allowance paid to an employee and the value of employer-provided board and lodging or transportation to and from a job site are included in the employee's income under the provisions

of subsection 6(1) of the *Act*. However, subsection 6(6) provides an exception to this general rule by allowing certain benefits related to special work sites or remote work locations to be excluded from income. This exception is provided only in limited circumstances.

[16] Subparagraph 6(6)*b*)i) of the *Act* allows an employee to exclude from income the value of free or subsidized transportation, or a reasonable allowance received for transportation expenses incurred by the employee, with regard to duties of a temporary nature if the employee received board and lodging, or a reasonable allowance in respect of board and lodging from his/her employer for that period. The employer-provided transportation or allowance must relate to transportation between the employee's principal place of residence and the special work site. In the instant case, the Allowance is not paid for transportation between the Appellant's place of residence to a special work site, it is paid for transportation between the Appellant's residence and the pick-up point which is Edmonton, AB. Edmonton is not a special work site within the meaning of subparagraph 6(6)(*a*)(i) of the *Act*. DDMI recognizes that the travel expenses between an employee's place of residence and the pick-up point, i.e., Edmonton, are personal expenses. The Allowance in this case was meant to assist the employee in paying the costs of travel between the residence and Edmonton, AB. Edmonton was not the special work site, it was only a pick-up point and not a work site at all.

[17] Under subparagraph 6(6)*b*)ii) of the *Act*, where an employee performs work at a location that qualifies as a remote work location, the value of, or a reasonable allowance for transportation between the remote work location and any location in Canada can be excluded from the qualifying employee's income. In the instant case, DDMI provided transportation between the mine site, being the remote work location, and the pick-up point of Edmonton, which would qualify as "any other location" in Canada within the ambit of subparagraph 6(6)*b*)ii) of the *Act*. As I understand it, the cost of this transportation between Edmonton and the remote work location was not included in the Appellant's income.

[18] When the requirements set out in subsection 6(6) are met, the employer and the employee must complete the Form TD4, *Declaration of Exemption – Employment at Special Work Site*, so that the relevant benefit or allowance that was paid pursuant to subparagraph 6(6)*b*)i) can be excluded from the employee's income. In this form, both the employer and the employee certify that the requirements of subsection 6(6) have been met. In the instant case, DDMI refused to provide a Form TD4 on the grounds that the Allowance that was paid was not

reasonable and also that the Form TD4 is to be used when an exemption for work at a special work site is claimed under subparagraph 6(6)*a*)i) of the *Act* and not when claiming an exemption under the remote work location exemption under subparagraph 6(6)*a*)ii) of the *Act* which is the exemption for which the Appellant qualified.

[19] The Appellant is of the view that DDMI should have provided a TD4 form and was unreasonable in refusing to do so. This raises the question of whether or not the Court can allow a benefit allowance to be excluded from income pursuant to subsection 6(6) of the *Act* in relation to employment at a special work site in the absence of a TD4. Research of the usual jurisprudential data bases indicate that there are only three reported cases which even mention the Form TD4. None of these cases deal with the issue of the absence of a TD4 form. Consequently the Court has sought guidance from those cases that have dealt with the issue of whether or not the requirements of a Form T2200 dealing with the deductibility of employment expenses. The provisions of subsection 8(10) of the *Act* in relation to the T2200 certificate is a mandatory provision failing which a taxpayer cannot claim any employment related expenses, such as motor vehicle expenses, pursuant to section 8 of the *Act*. It has been held that the failure to obtain a T2200 certificate is fatal to a claim to deduct employment related expenses.

[20] In *Brochu v. R.*, 2010 TCC 274, Justice Boyle of this Court stated at paragraph 11 of his reasons for decision that if there were shown to exist exceptional circumstances, such as an employer unreasonably refusing to provide a T2200, a taxpayer could deduct his motor vehicle expenses without a T2200. However, no exceptional circumstances were shown to exist in the case he was dealing with.

[21] In *Kreuz v. R.*, 2012 TCC 238, the Appellant was not provided with the prescribed Form T2200 by his employer, as contemplated by subsection 8(10) of the *Act*, certifying that he had met the conditions of paragraph 8(1)(h.1) of the *Act*. In *Kreuz*, the employer was of the view that the appellant did not meet the conditions of subparagraphs 8(1)(h.1) of the *Act* and so did not provide a Form T2200. The Appellant took the view that the employer was unreasonable in not providing him with a Form T2200. Justice D'Auray of this Court stated at paragraph 76 that obtaining a T2200 form is a condition precedent for the Appellant to be entitled to deduct his motor vehicle expenses. The Appellant had not established that his employers acted unreasonably or in bad faith in not providing him with a T2200 form.

[22] More recently, in *Chao v. R.*, 2018 TCC 72, the Court asked "Is form 2200 always obligatory?" Justice Jorré of this Court held at paragraph 93 that in a case where an employer has refused to fill out the form, it would have to be shown that the employer acted unreasonably or in bad faith. However, the Appellant in *Chao* had not succeeded in demonstrating this.

[23] In the case at bar, I am unable to conclude that DDMI was acting unreasonably or had demonstrated bad faith in refusing to provide the Appellant with a completed Form TD4. The Allowance of 4.5% of salary was arbitrary and bore no resemblance at all to the actual costs involved in travelling between the Appellant's principal residence and Edmonton, AB.

[24] In the instant case, the Appellant decided to keep his main residence in New Brunswick and to return to the pick-up point at the beginning of his next work rotation. That is certainly a personal choice and one that is certainly understandable. However, this choice leads to consequences that he must accept. The travel between New Brunswick and Edmonton, AB were essentially personal in nature since he chose to maintain his principal place of residence in another province. It has long been established that expenses related to travel from one's residence to one's work site are personal expenses. If the employer covers these expenses or pays for part of them, then they are a taxable benefit.

Conclusion

[25] To summarize, I arrive at the following conclusions:

a) The Allowance was not paid for transportation between the Appellant's principal place of residence and a special work site; it was paid for transportation between the Appellant's residence and the pick-up point which is Edmonton, AB. Edmonton is not a special work site within the meaning of subparagraph 6(6)*a*)i) of the *Act*.

b) I agree with counsel for the Respondent that the Allowance that was paid to the Appellant was more in the nature of an incentive in order to attract and retain quality employees.

c) DDMI refused to provide the Appellant with a completed Form TD4, *Declaration of Exemption – Employment at Special Work Site*, certifying that the requirements of subsection 6(6) have been met. Form

TD4 is required before the Allowance for travel between an employee's principal place of residence and a special work site can be excluded from taxable income.

d) I am unable to conclude that DDMI acted unreasonably or demonstrated bad faith in refusing to provide the Appellant with a completed Form TD4. The Allowance of 4.5% of salary was arbitrary and bore no resemblance at all to the actual costs involved in travelling between the Appellant's principal place of residence and the pick-up point in Edmonton, AB. In addition, DDMI's position that the TD4 form applies only to an exemption pursuant to subparagraph 6(6)*b*)i) dealing with special work sites, and not subparagraph 6(6)*b*)ii) dealing with remote work locations is correct.

e) It was the Appellant's personal choice to keep his principal place of residence in New Brunswick. I respect that choice. However, this choice leads to consequences that he must accept. The travel between New Brunswick and Edmonton, AB were essentially personal in nature since he chose to maintain his principal place of residence in another province. It has long been established that expenses related to travel from one's residence to one's place of work are personal expenses. If the employer covers these expenses or pays for part of them, then they are a taxable benefit.

[26] For all of the foregoing reasons, this appeal is dismissed.

Signed at Kingston, Canada, this 11th day of December 2018.

"Rommel G. Masse"

Masse D.J.

CITATION:	2018 TCC 232
COURT FILE NO.:	2017-2932(IT)I
STYLE OF CAUSE:	TERRY McEACHERN AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Miramichi, New Brunswick
DATE OF HEARING:	September 17, 2018
REASONS FOR JUDGMENT BY:	The Honourable Rommel G. Masse, Deputy Judge
DATE OF JUDGMENT:	December 11, 2018

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Dominique Gallant

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Nathalie G. Drouin
Deputy Attorney General of Canada
Ottawa, Canada