Docket: 2021-285(IT)I

BETWEEN:

RICHARD T MCCULLOUGH,

Appellant,

and

HIS MAJESTY THE KING,

Respondent,

Docket: 2021-3130(IT)I

AND BETWEEN:

RICHARD T MCCULLOUGH,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on September 14, 2022, at North Bay, Ontario

By: The Honourable Justice Ronald MacPhee

Appearances:

Counsel for the Appellant:	Gregory DuCharme
Counsel for the Respondent:	Hubert-Martin Cap-Dorcelly

JUDGMENT

The Appeal from the reassessment made under the *Income Tax Act* for the Appellant's 2017 and 2019 taxation years are allowed, without cost.

Signed at Ottawa, Canada, this 21st day of October 2022.

"R. MacPhee"

MacPhee J.

Citation: 2022 TCC 118
Date: 20221208
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Docket: 2021-3130(IT)I

AND BETWEEN:

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Respondent.

AMENDED REASONS FOR JUDGMENT

MacPhee J.

[1] The issue to be decided in this appeal is whether the Appellant is entitled to deduct employment expenses under subsection 8(1) of the *Income Tax Act*[1](the "*Act*") for the 2017 and 2019 taxation years. The employment expenses in question relate to lodging, meals and entertainment, and motor vehicle expenses. In 2017, the employment expenses amount to $23,599, along with a related GST/HST rebate of $2,702. In 2019, the employment expenses amount to $10,791.28.

[2] At the outset of trial, counsel for both parties advised that the only issue I must resolve is whether the Appellant meets the criteria set out in paragraph 8(1)(h) of the

[1] *Income Tax Act*, RSC, 1985, c 1 (5th Supp) [*Act*].

Act. The Appellant and Respondent agreed that my conclusion on the 8(1)(h) analysis will be determinative of all matters being appealed.

Facts for the years before the Court:

[3] The Appellant is an industrial engineer. He resides in Lakehurst, Ontario with his wife and their three adult children. The Appellant works at Savage Arms (Canada) Inc. ("Savage Canada") as a Vice President/General Manager. Savage Canada is part of a worldwide conglomeration of companies. As of 2019, the head of the worldwide conglomeration was Vista Outdoor Inc.

[4] Savage Canada's office and headquarters is located in Lakefield, Ontario. During his employment with Savage Canada, the Appellant's regular place of employment was at the Savage Canada headquarters.

[5] Savage Canada produced a specific type of rifle, called the rimfire rifle. Savage Canada had approximately $55 million in annual sales for the 2017 and 2019 taxation years.

[6] The other company in issue, Savage Arms Inc. ("Savage USA"), also produced rifles, but a different type than those made in Canada. Savage USA produced a centrefire rifle. Savage USA was a much larger company than Savage Canada, having approximately $250 million in annual sales for the 2017 and 2019 taxation years. Savage USA is located Westfield, Massachusetts.

[7] In 2017, the duties of the Appellant's employment changed. The Appellant testified that his employer, Savage Canada, asked him to assist a sister company in the USA. To do this, the Appellant took on the role of Senior Director of Manufacturing for Savage USA. The Appellant performed these additional duties from August 2017 until April 2019.

[8] The Appellant was required to spend two to three weeks every month at the Savage USA office in Westfield, Massachusetts. The Westfield office was approximately an 8 hour drive from the Appellant's home. When he was not working at Savage USA, the Appellant continued his duties with Savage Canada at his regular place of employment, in Lakefield. Ontario.

[9] Various reasons were provided in evidence by the Appellant as to why he was asked to assist in the operations of Savage USA. The Appellant's testimony was

logical, clear, consistent and not seriously challenged in cross-examination. I therefore accept these reasons to be accurate.

[10] The reasons why the Appellant was asked to assist Savage USA were as follows:

A. The Appellant had great success running Savage Canada's operations. His facility was one of the most successful in the overall group of companies;

B. Savage USA's operations were struggling. The evidence at trial was that both the Appellant's employer and Savage USA believed that the Appellant, because of his expertise, could improve operations at Savage USA; and

C. The Appellant was ambitious and seeking additional challenges at work, and was happy to take on the added responsibility. The Appellant also testified that it was important that he help the sister corporation, in order to be a good team player. Finally, the Appellant received an additional $100,000 in salary as compensation for taking on these responsibilities.

[11] The Appellant signed an addendum to his employment contract, dated July 17, 2017. The employment contract, as well as the addendum, was between Savage Canada and the Appellant. The Appellant did not ever sign a contract with Savage USA.

[12] The addendum to the Appellant's employment contract sets out the following:

(i) It was an acting position;

(ii) As part of the employment in Westfield, Massachusetts, the Appellant was responsible for costs related to food, beverage, entertainment and travel to the Savage USA work site; and

(iii) The Appellant was to continue his duties and responsibilities with Savage Canada, and assume numerous new duties and responsibilities with Savage USA.

[13] The Appellant had to obtain a temporary work visa to work at Savage USA.

[14] The Appellant testified that his assistance to Savage USA was always intended to be temporary. I accept this testimony for five main reasons:

(i) The Appellant's testimony in this regard was not significantly challenged at trial;

(ii) The terms of the addendum state clearly his position with Savage USA would be "acting";

(iii) The employment contract for taking on these additional duties was signed with Savage Canada, not Savage USA;

(iv) The Appellant only worked at Savage USA for 19 months; and

(v) At all times, Savage Canada paid the entirety of the Appellant's wages. If the intention was for the Appellant to be permanently employed with Savage USA, one would think that Savage USA would have assumed some responsibility for the Appellant on their payroll.

[15] As a result of this temporary arrangement, the Appellant paid lodging, food and other travel expenses in order to perform his duties for Savage USA. Neither Savage Canada nor Savage USA reimbursed him for these expenses.

[16] Finally, I must provide comment on an issue that arose at trial. The Appellant attempted to enter as an exhibit an affidavit from Albert Kasper. While I understand that section 18.15(3) of the *Tax Court of Canada Act*[2] states that the Court is not bound by any legal or technical rules of evidence, thus giving me a broad discretion to accept proposed evidence, this discretion is to be applied while ensuring fairness for all parties before the Court. In this instance, I have chosen to put no weight on the affidavit whatsoever. The Appellant provided the affidavit document very late in the litigation process. The Respondent, upon receipt of the affidavit, provided the Appellant's counsel with follow up questions that were left unanswered.

[17] Based upon the inability of the Respondent to cross-examine on the affidavit from Albert Kasper, and the lack of effort put forth by the Appellant to ensure that

[2] *Tax Court of Canada Act*, RSC, 1985, c T-2.

the document came before the Court in a procedurally fair manner, I am putting no weight on the document. To do otherwise would allow trial by ambush. Two experienced counsel are involved in this matter. Appropriate arrangements could have been made to ensure that this evidence came before the court in a procedurally fair manner.

Position of the Appellant

[18] To support his argument that he is entitled to claim expenses under paragraph 8(1)(h) of the *Act*, the Appellant submits the following:

(i) The Appellant's duties with Savage USA were temporary, and did not alter his duties for his Canadian employer;

(ii) The Appellant's Senior Director position with Savage USA required the Appellant to attend the USA location from time to time, but not on a full time basis; and

(iii) The Appellant's ordinary place of business was in Lakefield, Ontario.

Position of the Respondent

[19] The Respondent takes the position that the Appellant had two regular places of work; Savage Canada and Savage USA. As such, the Appellant was not entitled to claim his lodging, food, beverage, and automobile expenses related to his travel to the USA location. Allowing the Appellant to deduct these expenses would amount to allowing the Appellant to deduct personal expenses. The Respondent states that the Appellant therefore does not qualify to deduct these expenses pursuant to the criteria set out in paragraph 8(1)(h) of the *Act*.

[20] Furthermore, in what I believe is an alternative position; the Respondent argues that the Court should conclude that the Appellant only worked for the one employer. This conclusion is based on the fact that Savage USA and Savage Canada are sister companies, operating under the same parent company. Therefore, because the Savage entities are related, the Respondent argues that the Appellant continued to have only one employer. If I understand the argument correctly, this employer would be Vista Outdoors Inc. His employer's place of business is in both Canada

and the USA. Therefore, the Appellant did not meet the requirements of paragraph 8(1)(h) of the *Act*.

Analysis:

[21] Section 8 of the *Act* allows for deductions from income from office or employment. Pursuant to subsection 8(2) of the *Act*, expenses not specifically listed under subsection 8(1) are not deductible from employment income. Subsection 8(1) of the *Act* allows for a long list of specific deductions, including travel expenses.

[22] The criteria to deduct travel expenses is under paragraph 8(1)(h) of the *Act*, which reads as follows:

> Travel expenses
>
> (h) 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), 6(1)(b)(vi) or 6(1)(b)(vii), not included in computing the taxpayer's income for the year, or
>
> (iv) claims a deduction for the year under paragraph 8(1)(e), 8(1)(f) or 8(1)(g);

[23] To paraphrase paragraph 8(1)(h) of the *Act*, an employee can claim a deduction if, among other requirements, the employee was "ordinarily required" to work away from the "employer's place of business or in different places". The definitions of "employer", "ordinarily", "required", and "employer's place of business or in different places" are explained below.

Who is the "employer"?

[24] Employer is defined in section 248 of the *Act* as follows: "employer", in relation to an officer, means the person from whom the officer receives the officer's remuneration.

[25] In this matter, Savage Canada paid the Appellant's salary at all times. The Appellant also had an employment contract with Savage Canada setting out the entirety of his duties. I therefore find that the Appellant only had one employer, and that employer was Savage Canada.

What does "ordinarily" mean?

[26] Ordinarily does not require the employee to be constantly travelling. Rather, it requires that a clearly defined portion of the employee's duties regularly demand absence from the customary place of employment from time to time.[3]

[27] In *Imray*, Campbell J stated that "ordinarily" is a synonym for "normally", "as a matter of regular occurrence", "commonly", and "usually".[4] In the same case, Campbell J also stated that mandatory attendance at a professional convention that only occurred annually could be described as "ordinarily" required.[5]

[28] The Appellant was ordinarily required to carry on his duties, as set out in the addendum to his employment contract dated July 17, 2017, at Savage USA in Wakefield, Massachusetts. Savage USA was away from the Appellant's place of employment. This occurred for two to three weeks every month, from August 2017 to April 2019. As such, the Appellant was ordinarily required to work away from his employer, Savage Canada.

What does "required" mean?

[29] The Federal Court of Appeal elaborated on the definition of "required" in *Hoedel*.[6] In *Hoedel*, a police officer had to use his personal vehicle to transport a police dog between the police station, the police officer's home, and elsewhere for purposes of police work.[7] There was no written requirement or oral contract that required employment use of the officer's personal vehicle.[8] Nonetheless, because non-compliance with this condition of employment can result in a poor performance review, the police officer was required to transport the police dog as a duty of

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[3] Canada Tax Service - McCarthy Tetrault Analysis, 8(1)(h), (h.1) – travel expenses.
[4] *Imray v R*, [1998] 4 CTC 221 at paras. 21, 24, 98 DTC 6580 [*Imray*]. See also *R v Patterson*, [1982] CTC 371 at paras. 51-53, 82 DTC 6236.
[5] *Imray*, *supra* note 4 at paras. 23-24.
[6] *Hoedel v R*, [1986] 2 CTC 419, 86 DTC 6535.
[7] *Ibid* at paras. 3, 5.
[8] *Ibid* at para. 4.

employment.[9] Thus, the expenses incurred by the police officer for transporting the police dog were deductible under paragraph 8(1)(h) of the *Act*.[10]

[30] In this case, the Appellant's employment contract clearly required him to perform specific employment duties for Savage USA. The contract also made the Appellant responsible for his own travel to Savage USA to perform these employment duties. As a result of the addendum to the employment contract, the Appellant was required to perform these work duties for Savage USA.

What does "employer's place of business" mean?

[31] The "employer's place of business" may be more difficult to discern when the employer temporarily assigns an employee to another city. In *Tremblay*, the taxpayer lived in Val Bélair, Quebec when the Royal Canadian Mounted Police hired him as a peace officer.[11] The taxpayer's employer immediately sent the taxpayer to Montreal to take an English course from September 1991 to May 1992.[12] Despite the taxpayer living in Montreal during two taxation years to attend this required course, Montreal was not the employer's place of business.[13]

[32] Permanency of employment is also a factor in the location of an employer's place of business. In *Freake*, Pizzitelli J of the Tax Court of Canada stated that the employer's place of business is not necessarily any new location that the employee attends to for employment duties.[14] In *Freake*, the taxpayer ordinarily resided in Newfoundland and worked in the US at various field locations as an electric lineman during the 2006 taxation year.[15] Pizzitelli J found that there was no evidence the taxpayer's position would ever become permanent at any of the field locations.[16] Rather, the taxpayer was only required to undertake his duties for as long as the project lasted, then returned home to Newfoundland.[17] The taxpayer was not offered

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[9] *Ibid* at para. 5.
[10] *Ibid*.
[11] *Tremblay v R*, [1998] 3 CTC 38 at para. 2, 1997 CarswellNat 2633.
[12] *Ibid*.
[13] *Ibid*.
[14] *Freake v R*, 2009 TCC 568 at para. 16.
[15] *Ibid* at paras. 2-3.
[16] *Ibid* at para. 16.
[17] *Ibid*.

a permanent position.[18] Thus, each of the field locations that the taxpayer worked at were not the employer's place of business.

[33] In this instance, despite the 19 months the Appellant spent travelling back and forth to Savage USA in Wakefield, Massachusetts, the Appellant's place of business was clearly at Savage Canada's headquarters in Lakefield, Ontario. As previously stated, I accept the Appellant's testimony that this assignment to Savage USA was only temporary. At all times, the employer's place of business was Lakefield, Ontario. Travel to Westfield, Massachusetts was travel by the Appellant away from his employer's place of business.

Were the expenses incurred for traveling in the course of office or employment?

[34] I was surprised that neither side addressed this issue in any detail. As described in the *Colavecchia* decision, there are two lines of cases with respect to whether an expense is incurred for travel in the course of office or employment. [19] The first lines of cases is identified in the *Chrapko*[20] decision, and the second line of cases is identified in the *Hogg*[21] decision.

[35] This first line of cases accepts that travel from an employee's home to various work sites is in the performance of a service for an employer. Thus, expenses incurred by the employee for travel between home to various work sites are deductible.[22]

[36] The second line of cases finds that travel from an employee's home to a work site is inherently personal, unless it can be shown that some duties are being performed by the employee during these travels (such as transporting supplies for an employer).[23]

[37] As noted, these two contrasting lines of cases were not addressed by either party at trial. Nor did either party provide submissions on whether the Appellant was

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[18] *Ibid*.
[19] *Colavecchia v R*, 2010 TCC 194 at para. 68 [*Colavecchia*].
[20] *Chrapko v Minister of National Revenue*, [1988] 2 CTC 342, 1988 CarswellNat 395 [*Chrapko*].
[21] *Hogg v R*, 2002 FCA 177.
[22] *Ibid* at para. 69. See also *Chrapko*, *supra* note 20 at para. 6.
[23] *Colavecchia*, *supra* note 19 at paras. 73-74.

providing a service to his employer during his monthly travels from his home to Westfield, Massachusetts.

[38] Given the lack of submissions on this issue, I will accept that the Appellant was providing a service to his employer in his eight-hour drive, and thus travelling in the course of his employment. The Appellant's employment contract required him to travel to Savage USA. Thus in his travels, the Appellant was fulfilling an employment obligation. I therefore find that the Appellant has met this requirement of paragraph 8(1)(h) of the *ITA*.

Conclusion:

[39] The appeals are allowed. From August 2017 to April 2019, the Appellant was required to carry on his duties of employment away from his usual place of business. His employer was at all times Savage Canada. Savage Canada paid the Appellant his salary, and the Appellant performed duties for Savage USA at Savage Canada's request. The Appellant was never employed by Savage USA. To emphasize, Savage USA is a separate entity from Savage Canada.

[40] It was to the benefit of Savage Canada that the Appellant improved operations at Savage USA. Therefore, in both years before the Court, the Appellant was ordinarily required to carry on the duties of his employment away from his employer's place of business in Canada.

[41] Therefore, the Appellant qualifies under the criteria set out in paragraph 8(1)(h) of the *Act*. The Appellant properly claimed $23,599 and $10,791.28 of employment expenses as deductions in 2017 and 2019, respectively.

[42] Under subsection 253(1) of the *Excise Tax Act*[24], the Appellant is entitled to a GST rebate of $2,702 for the 2017 taxation year due to the deductibility of the employment expenses under the *Act*.

[43] There will be no order as to costs.

These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated November 1, 2022.

[24] *Excise Tax Act*, RSC 1985, c E-15.

Signed at Ottawa, Canada, this 8th day of December 2022.

"R. MacPhee"

MacPhee J.

CITATION:	2022 TCC 118
COURT FILE NO.:	2021-285(IT)I 2021-3130(IT)I
STYLE OF CAUSE:	RICHARD T MCCULLOUGH AND HIS MAJESTY THE KING
PLACE OF HEARING:	North Bay, Ontario
DATE OF HEARING:	September 14, 2022
REASONS FOR JUDGMENT BY:	The Honourable Justice Ronald MacPhee
DATE OF JUDGMENT:	October 21, 2022
DATE OF AMENDED REASONS FOR JUDGMENT:	December 8, 2022

APPEARANCES:

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