Docket: 2020-2135(IT)I

BETWEEN:

GREGORY A. GESSNER,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on May 16, 2023, at Saskatoon, Saskatchewan

Before: The Honourable Justice Bruce Russell

Appearances:

Counsel for the Appellant:	Don Stewart
Counsel for the Respondent:	Candace Almightyvoice

JUDGMENT

The appeal of the April 30, 2019 reassessment of the Appellant's 2013 taxation year is dismissed, without costs.

Signed at Hamilton, Ontario, this 13th day of June 2023.

"B. Russell"

Russell J.

Citation: 2023 TCC 87
Date: June 13, 2023
Docket: 2020-2135(IT)I

BETWEEN:

GREGORY A. GESSNER,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Russell J.

I. Introduction:

[1] The appellant, Gregory A. Gessner, appeals the April 30, 2019 reassessment of his 2013 taxation year raised by the Minister of National Revenue (Minister) under the federal *Income Tax Act* (Act). He disagrees with the reassessment's addition of $36,000 to his 2013 taxable income. He asserts that this amount is exempt from income inclusion per subsection 6(6) for relating to his work at "special work sites".

II. Overview:

[2] In 2013 the appellant, residing with his family in Saskatoon, accepted employment as marketing manager with Suretuf Containment Ltd. (Suretuf), a company engaged in development and production of oil and gas industry products. His brother Clayton owned Suretuf and was its president. The Suretuf office/plant premises were located in the County of Vermilion River, Alberta, about 30 kilometres from Lloydminster, Alberta. Lloydminster is a small city about a three-hour drive from Saskatoon. Suretuf's mailing address was a Lloydminster post office box.

[3] Assumptions of the Minister pleaded in the respondent's Reply (para. 7) include that Suretuf paid the $36,000 to the appellant in 2013, in respect of weekly

living expenses comprised of three amounts - transportation ($9,000), lodging ($9,000) and board ($18,000). Additionally he was reimbursed $7,502 for meals, fuel and vehicle repairs and maintenance.

[4] At the hearing of this matter the appellant maintained a different "special work site" argument than reflected in the pleadings, being that he visited the premises of many customers and potential customers in the course of his work and these numerous locations that he visited constituted individual "special work sites".

[5] As well, there is the matter that the appealed reassessment is *prima facie* statute-barred, insofar as it was not raised within the applicable normal reassessment period of three years from date of initial assessment. The appellant did not raise this issue, but it was referenced in the respondent's Reply.

III. Issues:

[6] There are two issues. One is whether subsection 6(6) exempts from tax the appellant's $36,000 payment from his employer, Suretuf. The second is whether subparagraph 152(4)(a)(i) applies to render the appealed reassessment procedurally valid despite that it was not raised within three years of the date the Minister initially assessed the appellant's 2013 year.

IV. Pertinent Legislation:

[7] Subsection 6(6):

> 6(6): Employment at special work site or remote location - Notwithstanding subsection (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 (a)(i), or

(ii) the location referred to in subparagraph (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 (a) during which the taxpayer received board and lodging, or a reasonable allowance in respect of board and lodging, from the taxpayer's employer.

Subparagraph 152(4)(a)(i):

152(4)(a)(i): Assessment and reassessment [limitation period] - The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest, or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if

(a) the taxpayer or person filing the return

(i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act…

V. Does subsection 6(6) apply, to render the appellant's $36,000 payment from Suretuf exempt from tax?

[8] For subsection 6(6) to apply in this matter, relating to "special work site(s)" as framed by the appellant, the $36,000 payment must be a "reasonable" amount, must have been paid for board, lodging and/or transportation in respect of work by the appellant at a special work site or sites each for periods of at least 36 hours including time to travel there from the taxpayer's Saskatoon home and return. As subsection 6(6) provides, a special work site is a location where the duties performed by the taxpayer were of a temporary nature.

[9] The appealed reassessment reflects the Minister's conclusion that the location of the Suretuf office/plant is not a special work site, which is how this matter was initially framed by virtue of the CRA form TD4 referenced below, signed by the appellant.

[10] The appellant was the sole witness. He testified that he worked for Suretuf from 2 January 2013 until into 2016 – a more than three year period. His departure at the end of that period was on his initiative. He had accepted another employment position, based in his home city of Saskatoon.

[11] The evidence established that Suretuf manufactures secondary containment systems for the oil and gas sector. As stated, the appellant was hired as marketing manager of Suretuf's oil and gas industry products. On January 2, 2013, he signed a completed CRA form TD4 entitled "Declaration of exemption – employment at a special work site" (Ex. R-1). This document was produced by the respondent. The appellant's brother who owned Suretuf had filled out the form, but it had not been signed on behalf of Suretuf. The appellant's brother was not called as a witness.

[12] This form addresses aspects of the $36,000 exemption from income in the context of representing the Suretuf office/plant as being a "special work site". The appellant reviewed the form before signing it. He said the form as completed and as signed by him reflected "agreement in principle" between the two brothers. At the hearing the appellant seemed reluctant to express full agreement with the details in this document that he had signed over ten years ago during the relevant taxation year.

[13] This completed TD4 form identified the "exact location" of the "special work site" as being "LSD 5.5 NE4-48-LW4", in the County of Vermilion River, Alberta. This location is understood to be where the Suretuf office/plant premises is located. As well, the form specifies the one-year period of January 2, 2013 to December 31,

2013 as the "period of work at the special work site requiring the employee to be away from his or her principal place of residence for at least 36 hours".

[14] Also, the form specifies the "benefits or allowances" the appellant was to receive in relation to work at the special work site - being $18,000 for board, $9,000 for lodging and $9,000 for transportation, totalling $36,000.

[15] The "employer's certification" (that Suretuf did not sign) on this CRA form TD4 reads:

- the duties the employee has to perform at the special work site are temporary and, by reason of distance, the employee is not expected to return daily to his or her principal place of residence.

- the board and lodging provided or the allowance received by the employee have been for a period of at least 36 hours spent at the special work site (including the time the employee spends traveling between the principal place of residence and the special work site).

- the benefits or allowances for transportation given to the employee relate only to the period the employee also receives the value of, or allowances for, board and lodging.

[16] As well there was entered in evidence an unsigned letter from Suretuf to the appellant dated March 11, 2013, although again unsigned (part of Ex. R-1) on Suretuf's part. It welcomes him as marketing manager for Suretuf, "based out of our Lloydminster Office", effective January 1, 2013. The appellant signed this document on March 11, 2013.

[17] It sets out "details of the new position", including that the appellant's "rate of base pay" was C$84,000 per year.

[18] Other "details" include:

- he had a, "[r]emote work location provision to commute weekly from Saskatoon to Lloydminster, Alberta to cover weekly living expenses: C$36,000 per year."

- "Expenses: the Company will reimburse you for reasonable travel, expenses incurred in the process of carrying out your duties. Expenses are to be submitted on a regular basis."

- "Travel: Extensive travel through your [western Canada] Region with some overnight stay is required."

[19] The appellant testified that he did not always travel directly from Saskatoon to Suretuf's office or back. He often might travel from his family home in Saskatoon at the beginning of a week directly to the location of a customer or potential customer that he planned to visit.

[20] He agreed that Suretuf reimbursed him for his travel related expenses. There was no evidence that any claimed expenses had gone unpaid. In 2013, Suretuf paid the appellant expense reimbursements totaling $7,502 for meals, fuel and vehicle repairs and maintenance costs. This is apart from the subject $36,000.

[21] Apparently, the appellant when working out of Suretuf's premises would lodge with his brother at the latter's residence in or about Lloydminster, without any charge or payment for same. However, the appellant testified that he paid for many of their shared evening meals. It is to be recalled that $9,000 of the subject $36,000 was for lodging while working at the Suretuf office/plant premises, presumed to be a "special workplace site".

[22] Given the above evidence, he question is whether there is a "special work site" situation in respect of Suretuf's work premises in County of Vermilion River, where the appellant was to base his work as marketing manager? As noted, the premises included an office and a plant, 30 kilometres or so from the small city of Lloydminster, Alberta. Being reasonably close to Lloydminster, Suretuf's premises did not constitute a remote location within the meaning of subparagraph 6(6)(a)(ii), above. In any event there were no submissions from the appellant in this matter that this was a remote location (although the word "remote" does appear once in the completed TD4 form, see above).

[23] As for being a "special work site", I concur with colleague Justice Jorre who stated in *Bourget v. Her Majesty*, 2009 TCC 533 (para. 18), that a "special work site" is not the equivalent of "any place of work". Also in that decision I note and concur with the Court's conclusion (para. 21) that:

> Regardless of the scope of the meaning of the words "special work site", it does not include the appellant's employer's headquarters…

[24] My understanding that Suretuf's "office/plant" premises in County of Vermilion River *de facto* constituted Suretuf's headquarters. I heard no reference to any other Suretuf location.

[25] In any event, subparagraph 6(6)(a)(i) describes a "special work site" as "being a location at which the duties performed by the taxpayer were of a temporary nature". Thus, were the appellant's duties as marketing manager, "of a temporary nature"?

[26] While the TD4 form signed by the appellant identified the "work period" as being one year, in fact he continued with this job for over three years, before leaving on his own motion, as above noted. More than three years of work before leaving on his own terms is not at all suggestive that his marketing management duties undertaken in early 2013 were at all temporary in nature.

[27] To the contrary, the position of marketing manager with commensurate duties would seem to be a key permanent position, all the more so for a company such as Suretuf producing products for sale to oil and gas industry customers across western Canada and somewhat beyond. That is, the duties of a marketing manager would not be expected to be completed after any finite period, but rather to continue indefinitely.

[28] As part of the respondent's Ex. R-1 exhibit, there is on Suretuf letterhead a bullet list of "General Duties", pertaining to the appellant as marketing manager. They include:

- "Product development. This includes travelling by car or plane to all customer sites and locations to gain insight and first-hand knowledge of design changes to existing wall."

- "Formulate and establish market action plans, budgets, goals, quotas for operations."

- "Participate in development of market strategies and long-range planning."

- "Maintain frequent contact with the Operations Manager, plant and sales staff."

- "Appraise promptness of order processing, deliveries, technical services and parts, warranty and other customer services. Recommend changes."

- "Attend meetings and training at the office/plant as required."

- "Provide technical, product, and application solutions to customers throughout the assigned territory."

- "Prepare and perform product assessments as required. This may be in the field or in the office."

- "Continually appraise company products, policies and procedures as opposed to competitor's line relative to design, pricing, marketability, etc. Recommend changes as required. Recommend pricing and market strategy."

[29] These duties cannot reasonably be said to have been "of a temporary nature". These are duties of a continuing nature, fundamental to the core job of managing the marketing of products that a business has produced.

[30] In contrast, an example of a temporary duty would be the execution and completion of a defined project (e.g., a construction project) at a particular site. When the project is done it is done. The project's end is contemplated from its very beginning.

[31] Accordingly, I conclude that the Suretuf premises did not constitute for the appellant a "special work site", so as to trigger subsection 6(6) and thereby allow the subject $36,000 payment to be tax-free.

[32] As noted, at the hearing the appellant departed from the argument that I have just addressed (that the Suretuf premises constituted a "special work site"), as reflected in the CRA TD4 form that the appellant had signed in early 2013.

[33] Rather, at the hearing the appellant through his representative submitted in evidence a lengthy listing of Suretuf customers and potential customers and the locations of their various premises (Ex. A-1) that he said he had visited over his time as Suretuf's marketing manager. The multi-page computer printed list consisted of several hundred contact names for oil and gas businesses in Calgary, Edmonton, Lloydminster, Red Deer, Taber, Lethbridge and other Alberta locations, and including locations in Saskatchewan, Manitoba and North Dakota that he said he had visited.

[34] His position at the hearing was that each of the individual locations of his asserted customer and potential customer visits constituted a "special work site".

[35] Were these "special work sites"? If so, any salesperson could claim likewise. No supportive records as to such visits, confirming the manner of such visits (in person, by phone or internet) were produced. Nor was any mileage log produced. Perhaps some of these actual visits are the basis for the $7,502 total of expense reimbursement that the appellant received in the one year in issue - 2013. We don't know. The listing is much too lengthy to contemplate that all such locations could have been visited in the relevant 2013 taxation year.

[36] The appellant said several times that the Act did not require him to save receipts – presumably he was expressing his understanding of subsection 6(6). But of course the subsection requires that the expenses it covers have to be "reasonable". That cannot be gauged without receipts. The further question is, how could he be justified in seeking the subject $36,000 as an expense allowance in addition to the $7,502 remuneration?

[37] And as well, what temporary aspect is there of duties relating to conducting the marketing process in relation to any particular customer? In each instance marketing duties are contemplated as continuing rather than being temporary in nature. The appellant's duties were to establish and maintain long-term business relationships. These are not temporary duties. This work would be expected to be ongoing and continuous in nature. Thus, these locales could not be "special work sites" as the duties associated therewith were not in any respect temporary in nature as contemplated by subsection 6(6).

[38] Thus, I conclude that the locales of the individual customers that the appellant purportedly visited (which visits were not at all supported by the submission of travel records of any nature),did not themselves constitute "special work sites" so as to justify application of subsection 6(6), so as to render any of the subject $36,000 as being non-taxable.

VI. Is the reassessment statute-barred?

[39] Lastly, I address the issue of whether the *prima facie* statute-barred appealed reassessment is actually statute-barred and thus procedurally invalid.

[40] The respondent pleads in its Reply at paras. 8 and 12 that the appellant made misrepresentations in his 2013 return attributable to neglect, carelessness or wilful

default, thereby entitling the Minister per subparagraph 152(4)(a)(i) to raise the appealed reassessment on April 30, 2019, being well after the May 5, 2017 expiry of the applicable normal reassessment period.

[41] The respondent pleads that the misrepresentation was the appellant's omitting inclusion of the $36,000 in his 2013 taxation year return. I first have had to deal with whether this omission was incorrect (thereby being a misrepresentation). Per above I have concluded that the $36,000 should have been reported as claimed "special work sites" did not exist. Thus the non-reporting was a misrepresentation.

[42] The remaining question per subparagraph 152(4)(a)(i) is whether that misrepresentation was the result of "negligence, carelessness or wilful default". If so then the appealed reassessment is not statute-barred.

[43] Although the appellant did not raise this issue, rightly it was pleaded in the respondent's Reply. In *Vincent DiCosmo v. Her Majesty*, 2017 FCA 60, para. 9, the Federal Court of Appeal observed:

> 9. In our view, the jurisprudence of this Court requires that the issue of whether an assessment is statute-barred must be specifically pleaded. The underlying rationale is to ensure fairness and to permit all evidence relevant to be before the Court.

[44] Here the misrepresentation alleged by the respondent (Reply, para. 8) is that reported income was understated by $36,000. The appellant's salary income from employment was $84,000, and the Minister considers that the assessed amount of $36,000 from his employer should also have been reported, that latter amount representing approximately 34% of the $120,000 total of these two figures.

[45] In *Venne v. R.*, a venerable Federal Court Trial Division decision from 1984, Strayer J. as he then was viewed the subparagraph 152(4)(a)(i) circumstances of, "neglect, carelessness or wilful default" as equivalent to a taxpayer failing to exercise reasonable care.[1] Further, per *Regina Shoppers Mall Ltd. v. R.*, exercising reasonable care requires a taxpayer to act as a "wise and prudent person".[2]

[46] Additionally, in 1989, the FCTD observed in *1056 Enterprises Ltd. v. R.* that:

> Subsection 152(4) protects such conduct, and perhaps only such conduct, where the taxpayer thoughtfully, deliberately and carefully assesses the situation as being one

[1] *Venne v. R.*, [1984] CTC 223 (FCTD) at para. 16
[2] *Regina Shoppers Mall Ltd. v. R.*, [1990] 2 C.T.C. 183 (FCTD) at 186, aff'd [1991] 1 C.T.C. 297 (FCA).

> in which the law does not exact the reporting of that which the taxpayer bona fide believes does not exist.[3] (underlining added)

[47] This language was approved by the Federal Court of Appeal in *Regina Shoppers Mall*.[4]

[48] The respondent submits that the appellant failed to exercise reasonable care in concluding that this $36,000 was paid in relation to his working at "special work site(s0" as provided in subsection 6(6), in addition to his work expenses having been reimbursed by his employer.

[49] In my view, the appellant did not exercise the required reasonable care. He did not, "thoughtfully, deliberately and carefully assess the situation" in choosing not to report this significant amount of $36,000 as income despite that already he had been reimbursed the not inconsiderable sum of $7,502 for actual work travel related expenses. There was no clarification as to whether this latter amount applied to expenses the $36,000 was to reimburse.

[50] Nor, it appears to me, did he thoughtfully, deliberately and carefully assess whether his marketing management work duties were of a temporary nature (a necessary characteristic of "special work sites"). This is so whether in respect of the Suretuf office/plant premises or the various locations in Alberta and elsewhere where the appellant sought to market Suretuf's products in 2013 - 2016 (absent evidentiary records confirming such travel to such locations).

[51] The appellant's assertion that he always intended to leave the position shortly (although he did not, staying for over three years) does not at all establish any temporary nature of the marketing work duties themselves. This should have been clear to him in "thoughtfully, deliberately and carefully" assessing his position.

[52] Also noted was that $9,000 of the $36,000 apparently was intended for his lodging expenses in the Suretuf office/plant area, yet he stayed with his brother in that area for no charge. Knowing this is a further reason as to why the appellant could not reasonably have concluded that he need not report the $36,000 or any part of it.

[53] Thus, I find that subparagraph 152(4)(a)(i) applies to render the appealed reassessment as not being statute-barred. The appellant omitted to report the $36,000

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[3] *1056 Enterprises Ltd. v. R.*, [1989] 2 C.T.C. 1 (FCTD) at para. 28
[4] *R. v. Regina Shoppers Mall Ltd.*, [1991] 1 C.T.C. 297 (FCA) at 299.

in his 2013 return through neglect, carelessness or wilful default. That is, he did not take reasonable care in deciding to omit the reporting of the $36,000 payment in his 2013 return.

VII. Conclusion:

[54] Accordingly, the appealed reassessment is valid, both substantively (subsection 6(6) does not apply to permit non-reporting of the $36,000); and procedurally (the omission to report was decided through neglect, carelessness or wilful default, thus rendering the reassessment not statute-barred).

[55] Thus, this appeal will be dismissed. It being an informal procedure appeal, there will be no order as to costs.

Signed at Hamilton, Ontario, this 13th day of June 2023.

"B. Russell"

Russell J.

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COURT FILE NO.:	2020-2135(IT)I
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