

Docket: 2013-2378(IT)I

BETWEEN:

HENRY DUECK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 28, 2014, at Winnipeg, Manitoba.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Agent for the Appellant: Gerald Friesen
Counsel for the Respondent: Penny Piper
Hugh Crawley (student-at-law)

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2011 taxation year is dismissed in accordance with the attached reasons for judgment.

Signed at Montréal, Québec, this 4th day of June 2014.

“Robert J. Hogan”

Hogan J.

Citation: 2014 TCC 187
Date: 20140604
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Appellant,

and

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REASONS FOR JUDGMENT

Hogan J.

I. Introduction

[1] This is an appeal by Henry Dueck (the “Appellant”) from a reassessment for the 2011 taxation year. The Appellant, in calculating his income for the 2011 taxation year, deducted moving expenses in the amount of \$21,861 pursuant to subsection 62(1) of the *Income Tax Act* (the “Act”). The Minister disallowed the Appellant’s deductions on the basis that the Appellant’s move was not an eligible relocation because (i) the Appellant did not change work locations and (ii) the distance between his old residence and his work location was not at least 40 kilometres greater than the distance between his new residence and his work location (the “Distance Requirement”).

II. Factual Background

[2] The Appellant worked as a concrete estimator for Jerry’s Concrete Works Ltd. (“JEWL”). The Appellant was employed with the same employer from 2005 through the 2011 taxation year. He worked both in and out of the office, but reported to the same work site routinely.

[3] In October 2011, the Appellant moved to Burke Bay, Winnipeg, Manitoba (the “New Residence”). Prior to that, the Appellant had resided on Road 2 East, Sanford, Manitoba (the “Old Residence”). Throughout this time the Appellant continued to work for JEWL.

[4] The Appellant testified that while he was living at his Old Residence his health began to deteriorate. He had a heart attack and suffered from exhaustion. The Appellant claims that his medical condition prevented him from continuing to work while at the same time maintaining his property. The Appellant testified that his Old Residence was located in a rural area, on a very large lot. He therefore decided to downsize and relocate on a smaller property closer to his work.

[5] The Appellant was very cautious in his explanation as to why he chose to sell his property. His responses to the questions concerning the reasons for his move appeared to be scripted. He was circumspect in describing his family’s situation. For example, he did not explain what he did with the proceeds of the sale of the Old Residence. Did he reinvest all the proceeds in his new home? Did he downsize in order to extract capital, which would then be used to generate funds to supplement his income as part of his retirement plan? It appears that the Appellant may have been approaching retirement. Was his Old Residence simply too big? Did he move to get closer to the city and his health care providers? Because the Appellant was less than forthright in his explanation of the circumstances surrounding the move, I have difficulty giving any weight to his declaration of his subjective intent as having been to move in order to continue working.

III. Issues

[6] This appeal raises two issues. The first is whether or not, for the purposes of subsection 62(1) of the Act, the Appellant meets the requirements of the definition of “eligible relocation” found in subsection 248(1) of the Act. The second issue is whether the route taken by the Appellant is the shortest normal route for the purpose of meeting the Distance Requirement.

IV. Analysis

[7] The relevant provisions are reproduced below:

62(1) There may be deducted in computing a taxpayer's income for a taxation year amounts paid by the taxpayer as or on account of moving expenses incurred in respect of an eligible relocation, to the extent that

(a) they were not paid on the taxpayer's behalf in respect of, in the course of or because of, the taxpayer's office or employment;

(b) they were not deductible because of this section in computing the taxpayer's income for the preceding taxation year;

(c) the total of those amounts does not exceed

(i) in any case described in subparagraph (a)(i) of the definition "eligible relocation" in subsection 248(1), the total of all amounts, each of which is an amount included in computing the taxpayer's income for the taxation year from the taxpayer's employment at a new work location or from carrying on the business at the new work location, or because of subparagraph 56(1)(r)(v) in respect of the taxpayer's employment at the new work location, and

(ii) in any case described in subparagraph (a)(ii) of the definition "eligible relocation" in subsection 248(1), the total of amounts included in computing the taxpayer's income for the year because of paragraphs 56(1)(n) and (o); and

(d) all reimbursements and allowances received by the taxpayer in respect of those expenses are included in computing the taxpayer's income.

248(1) "eligible relocation" means a relocation of a taxpayer in respect of which the following apply:

(a) the relocation occurs to enable the taxpayer

(i) to carry on a business or to be employed at a location (in section 62 and this definition referred to as "the new work location") that is, except if the taxpayer is absent from but resident in Canada, in Canada, or

(ii) to be a student in full-time attendance enrolled in a program at a post-secondary level at a location of a university, college or other educational institution (in section 62 and this definition referred to as "the new work location"),

(b) the taxpayer ordinarily resided before the relocation at a residence (in section 62 and this definition referred to as “the old residence”) and ordinarily resided after the relocation at a residence (in section 62 and this definition referred to as “the new residence”),

(c) except if the taxpayer is absent from but resident in Canada, both the old residence and the new residence are in Canada, and

(d) the distance between the old residence and the new work location is not less than 40 kilometres greater than the distance between the new residence and the new work location.

[8] With respect to the first issue, the Minister argues that the provision requires a change in the circumstances of the taxpayer’s employment. Counsel for the Respondent relies on *Bracken v. Minister of National Revenue*.¹ In *Bracken* the judge held that subsection 62(1) of the Act requires, *inter alia*, that there be (i) an old work location, (ii) a new work location, (iii) an old residence, and (iv) a new residence. Counsel for the Respondent acknowledges that the wording of subsection 62(1) of the Act applicable to the instant case differs from the wording of the version of the provision considered in *Bracken*. Nonetheless, the Respondent argues that the requirements set out in *Bracken* are applicable under the current version of the provision. In short, a taxpayer must show that the move was caused by a change in the circumstances of his or her employment.

[9] According to the Respondent, because there was no change in the circumstances of the Appellant’s employment, his moving expenses are not deductible. The evidence shows that the Appellant continued to be employed by the same employer and reported to the same work location. The Appellant does not dispute this fact. The Respondent cites decisions of this Court that have followed *Bracken* notwithstanding the change in the wording of the provision.

[10] The Appellant argues that an “eligible relocation” exists when the relocation of a taxpayer enables the taxpayer to remain employed at his current work location. More specifically, the taxpayer would meet the requirements of the definition of “eligible relocation” as long as he needed to move closer to his work location in order to continue working.

[11] The Appellant cites the principles enunciated in *Wunderlich v. The Queen*² as authority for the proposition that a change in the circumstances of a taxpayer’s employment is not required in order for the conditions of the definition provision

¹ [1984] C.T.C. 2922.

² 2011 TCC 539.

to be met. In *Wunderlich*, Justice Webb held that “new work location”, as defined in the definition of “eligible relocation”, is simply a location in Canada where the taxpayer is employed. The taxpayer does not have to show that the circumstances of his employment have changed. Justice Webb held that the reference to a “new work location” is simply a label which has no bearing on the meaning of the provision.

[12] Contrary to the Appellant’s submissions, the evidence shows that the Appellant sold his home and bought a smaller one for personal reasons. At the very least, for the reasons outlined below, the Appellant has failed to establish on a balance of probabilities that he moved in order to continue working. Therefore, I do not have to choose between the two interpretations described above to decide this appeal, and will refrain from doing so.

[13] It is common knowledge that homeowners move to a smaller home for a number of reasons. For example, they may be empty nesters who no longer require a large home and/or a large lot because their children have grown up. As people approach retirement, they downsize because they want to reduce living expenses, extract capital to supplement retirement income, or free up time for travel, etc. by freeing themselves from home maintenance. All of these reasons are valid personal choices.

[14] The only explanation offered by the Appellant is that he had to move because he could not maintain a large property and work at the same time. However, because the Appellant was guarded in his explanation, he has failed to convince me that this was the reason for his move. Had the Appellant described all of the circumstances surrounding the move, I may have been persuaded to accept the statement of his intent. For example, was capital extracted for reinvestment purposes? Was the new home closer to the Appellant’s health care providers? How long did the Appellant continue working after he moved?

[15] In my opinion, it is not sufficient for a taxpayer to declare that he moved to get closer to work and to continue working when there are no changes in his employment conditions. He must provide evidence as to the circumstances surrounding the move so as to enable the Court to decide whether the declaration of his subjective intent is accurate. If this were not required it would be easy for taxpayers to deduct moving expenses incurred for personal reasons by moving shortly before retirement rather than doing so after retirement.

V. Conclusion

[16] For all of these reasons, the appeal is dismissed.

Signed at Montréal, Québec, this 4th day of June 2014.

“Robert J. Hogan”

Hogan J.

CITATION: 2014 TCC 187
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PLACE OF HEARING: Winnipeg, Manitoba
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REASONS FOR JUDGMENT BY: The Honourable Justice Robert J. Hogan
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APPEARANCES:

Agent for the Appellant: Gerald Friesen
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