

TAX COUNSEL

BICYCLES, FOOTBALL AND FOOD TWO UNCOMMON CASES WITH COMMON THEMES

QUESTION: When is food consumed by a taxpayer a business expense?

ANSWER: When it is treated as high-performance fuel.

In the recently decided case of *Allan Wayne Scott v. Her Majesty the Queen*¹ our Federal Court of Appeal determined that to the extent a courier required extra calories, the food which supplied those calories was more like fuel for an automobile than basic human sustenance. Therefore, the cost of the additional food Mr. Scott consumed in order to perform his function as a courier was classified not as a personal expense, but rather as a business expense, and therefore fully deductible.

Concern was expressed by Revenue Canada (as it then was) that this ruling would open the floodgates to a myriad of deduction claims for personal expenses. However, the Federal Court dismissed those concerns, stating that such claims will be limited to those where it is possible to draw an analogy between automobile fuel and fuel for the human body. An example given of a hypothetical argument doomed to fail was that of a construction worker making a claim for food consumed during a workday. According to the Federal Court, there can be no comparison between the additional caloric needs of such a person and the fuel needs of an automobile. Therefore, the Court stated that a construction worker's additional food requirements are not deductible as business expenses. A foot courier's body, apparently, does exactly the same job as a Federal Express vehicle, albeit on a smaller scale.

Although we are not sure the Court's logic in distinguishing between a courier and a construction worker holds up under close scrutiny, we do applaud the learned judge for a reasonable decision made in the particular circumstances.

In another case involving claims for food ex-

penses², a different approach was adopted by the Tax Court. Craig Ellis was an Edmonton Eskimo football player in 1992, and was given a food allowance by the Eskimo club for away games. The food allowance turned out to be insufficient, requiring Mr. Ellis to spend twice the amount of the allowance for food while on the road.

Mr. Ellis reported as income earned in 1992 the food allowance paid by the Eskimos and claimed as a deduction the actual amount spent. Revenue Canada reassessed, based on the argument that he was paid a "reasonable" allowance for travel expenses within the meaning of subparagraph 6(b)(viii) of the *ITA*. Those provisions provided that a reasonable amount paid for travel allowance was not to be included in income reported, it being Revenue Canada's position that the employer had preset what was reasonable.

On this point, Mr. Ellis scored his touchdown. His evidence as to reasonability was accepted and his approach adopted — with one proviso. Section 67.1, in effect at the time, deemed expenses for food to be 80% of the amount actually spent, therefore he could deduct only that ratio of his road food costs.

Interestingly, Section 67.1 of the *ITA* has since been amended to allow only 50% of the amount spent as deductible. Mr. Ellis' appeal today would have no financial merit.

These kinds of issues tend to involve fairly small amounts of money. One always has to weigh the 'caloric' input of an appeal with its potential returns. Claims for food expenses are, however, typically one of several items reassessed which, together with potential interest and penalties, may be worth the effort to achieve for the taxpayer client his or her just desserts.

1. *Scott v. The Queen* 98 DTC 6530 (F.C.A.)

2. *Ellis v. The Queen* 98 DTC 1885 (T.C.C.)

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THE INQUIRY PROCESS -

A CHARTER ABUSE?

The Hearing Officer has the power to compel any witness to appear, to give oral or written evidence and to produce such documents as the officer deems necessary

Canada Customs and Revenue Agency has a number of investigative arrows in its quiver. Most are located near s. 231 of the *Income Tax Act*. One was lost in the bushes for a while but it seems that the Supreme Court of Canada has found and returned it¹.

In 1992, the Agency (then Revenue Canada) was investigating the affairs of Angelo Del Zotto and convened an inquiry under s. 231.4 of the *ITA*. The Minister appointed a hearing officer pursuant to that section. That officer had the power to compel any witness to appear in front of him, to give oral or written evidence, and to produce such documents as the hearing officer deemed necessary for the investigation.

In Mr. Del Zotto's case, the hearing officer had compelled Herbert Noble to appear as a witness. (Mr. Noble's connection to Mr. Del Zotto is unclear). Both Mr. Del Zotto and Mr. Noble objected to the inquiry process on the basis that it infringed on Mr. Del Zotto's rights against self-incrimination. Their view was that the inquiry process was simply a method of gathering information for the purposes of a criminal investigation and, as we all know, persons who are the subject of criminal investigations cannot be compelled to give evidence against themselves.

Mr. Del Zotto's view of the inquiry process was bolstered by the Agency's own tax operation manual, which stated, among other things, that *"Only cases with a prosecution potential will be selected for full scale investigation"*. The trial judge

disagreed with Mr. Del Zotto, stating this was a regulatory procedure and not a criminal one. Therefore, no right against self-incrimination could apply.

Mr. Del Zotto appealed to the Federal Court of Appeal, where two out of three judges agreed with him. The Court held that the inquiry process was designed and used to gather incriminating evidence against the taxpayer, which was a violation of the *Charter of Rights and Freedoms*. Given this, it struck the provision from the *ITA*.

Justice Strayer was the dissenting voice in the Federal Court of Appeal. His view was that, although it was possible for the Agency to use the inquiry process for purposes other than those regulatory, the process itself was not flawed. This view was ultimately adopted by the Supreme Court of Canada. It returned s. 231.4 to the *ITA* and sent Mr. Del Zotto and Mr. Noble back to the inquiry.

According to an Agency spokesperson, it launches this particular investigative arrow only infrequently. And there remains a significant body of law stating that evidence which is obtained through forced self-incrimination cannot be used to prosecute quasi-criminal offences. However, given this recent bulls-eye for CCRA, one wonders if it will more frequently aim the inquiry arrow at the hearts of errant taxpayers. Only time will tell.

1. *Del Zotto v. The Queen* 97 DTC 5328 (F.C.A.); rev'd 99 DTC 5328 (S.C.C.)



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Donald P. Mallon, BSc LLB, a partner in Prowse & Chowne, is a seasoned litigator with over 20 years of experience. Focusing on administrative and tax litigation, he draws upon his courtroom and negotiation skills to effectively represent individual and business taxpayers in disputes with Revenue Canada.



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