Federal Court of Appeal

Cour d'appel fédérale

Date: 20100415

Docket: A-36-09

Citation: 2010 FCA 98

CORAM: **SHARLOW J.A.**
DAWSON J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

RICHARD G. SCHROTER

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Edmonton, Alberta, on March 22, 2010.

Judgment delivered at Ottawa, Ontario, on April 15, 2010.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: SHARLOW J.A.
LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] This is an appeal from a judgment of the Tax Court of Canada under the informal procedure (2008 TCC 681). The issue raised on the appeal is whether the Tax Court judge erred in finding a parking pass, given at no cost to the appellant by his employer, constituted a taxable benefit or, in the alternative, whether the judge erred in quantifying such benefit.

Relevant Facts

[2] The appellant is employed by Telus at its office in downtown Edmonton. He first received a free parking pass from his employer when he was promoted to the position of Director of Income Taxation within Telus. Before receiving the pass, the appellant routinely took the bus to work. After receiving the pass the appellant routinely drove his own vehicle to work, reducing his daily commute time by one hour a day.

[3] During the audit that led to the assessment of the appellant, Telus advised the Canada Revenue Agency that "[g]enerally, parking was provided to employees in [pay] bands 5 and above, and to a limited number of employees below band 5 who had a particular need for it." The position of Director of Income Taxation is in pay band 5.

Statutory Provision

[4] The relevant statutory provision is paragraph 6(1)(*a*) of the *Income Tax Act*, R.C.S. 1985, c. 1 (5th Suppl.) (Act). The paragraph is as follows:

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	6. (1) Sont à inclure dans le calcul du revenu d'un contribuable tiré, pour une année d'imposition, d'une charge ou d'un emploi, ceux des éléments suivants qui sont applicables :
(*a*) the value of board, lodging and other benefits of any kind whatever received or enjoyed by the taxpayer in the year in respect of, in the course of, or by virtue of an office or employment, […]	*a*) la valeur de la pension, du logement et autres avantages quelconques qu'il a reçus ou dont il a joui au cours de l'année au titre, dans l'occupation ou en vertu d'une charge ou d'un emploi, […]

The Decision of the Tax Court Judge

[5] The judge observed that many Telus employees had received assessments for parking passes and had filed objections. A test case, *Adler v. The Queen*, 2007 TCC 272, 2007 DTC 783, had previously been decided and no appeal was taken from that decision.

[6] In *Adler*, the Tax Court reviewed the jurisprudence of the Supreme Court of Canada and this Court which had considered paragraph 6(1)*(a)* of the Act, particularly in the context of employer paid parking. The Tax Court then concluded that paragraph 6(1)*(a)* required consideration of a number of factors, the key factor in the circumstances then before the Court being who primarily benefited from the complimentary parking arrangement. This, in turn, required an assessment of the totality of the evidence in order to assess whether, in each taxpayer's circumstances, their "enjoyment of the parking privileges afforded by the free pass supplied by Telus was ancillary to the benefit derived by [the] employer."

[7] In the present case, the Tax Court judge concluded that it was important the Tax Court be consistent in its approach to employer paid parking. The *Adler* decision was intended to provide guidance for other Telus employee cases. As the judge viewed the conclusion in *Adler* to be a reasonable conclusion on a difficult issue, she decided to adopt the approach taken by the Tax Court in *Adler*.

[8] Turning specifically to the appellant, the judge observed that the thrust of his submissions was that he was given the pass to facilitate the overtime required in his new position. The appellant

testified that his manager had told him as much. The judge expressed the view that if the pass was provided on that basis, this would be sufficient to find a business purpose such that the benefit of the parking pass accrued primarily to Telus. However, the Tax Court judge concluded that the appellant's evidence was not sufficient to support this position. The appellant had failed to call his manager as a witness. The Tax Court judge found that for the appellant to prove Telus' purpose in providing the pass, it was "crucial" for the appellant to have called his manager to testify.

[9] The judge went on to consider whether, regardless of Telus' intent, the appellant's use of his car constituted a business purpose. The appellant had testified that by using his own car, as opposed to public transit, he saved approximately 1 hour a day in travel time. This hour was spent at work. The judge accepted this evidence. The judge found, however, that the appellant's "decision to drive to work was essentially a matter of personal choice." This was consistent with the approach in *Adler*.

[10] The Tax Court judge found the appellant's situation to be analogous to one of the appellants in *Adler*. That executive had argued that his pass allowed him to work longer hours and to carry out the onerous duties of his position to the benefit of the company. The judge in *Adler*, however, found that such use of a parking space was inextricably linked to personal choices rather than pursuant to any express or implied requirement of his employer. While Telus received an ancillary benefit, the main, primary benefit was received by the taxpayer.

[11] By parallel reasoning, the judge found that the parking pass was a taxable benefit to the appellant.

[12] Turning to the value of the pass, the Tax Court judge considered the appellant's arguments that the cost of the pass should be assessed in comparison to the cost of public transit and alternative choices such as parking in cheaper lots. The appellant also argued that the cost of operating a car should be factored in and, when all was tallied, there was no economic advantage to having a pass. This "cost saved" approach was expressed to be based upon the decision of this Court in *McGoldrick v. The Queen*, 2004 FCA 189, 2004 DTC 6407.

[13] The Tax Court judge expressed reservations about the cost saved approach but felt "compelled" to follow it. In assessing the cost saving, the judge viewed public transport or cheaper parking lots to be inappropriate comparators. The judge found that after his promotion in 1998, the appellant had increased responsibilities and duties and it was desirable that he work longer hours. From his perspective, the most effective way to accomplish this, without intruding on personal time, was to drive his car and park in the TELUS building. The judge was not satisfied there was an alternative that was as satisfactory to the appellant. Thus, the cost saved was the price charged to members of the public who paid to park in the Telus garage.

The Asserted Errors

[14] The appellant asserts that the Tax Court judge erred in the following respects:

i. The judge misconstrued and misapplied the relevant legal test to determine whether a taxable benefit had been received. Specifically, the judge failed to consider whether the appellant received an economic benefit or was economically enriched by the receipt of the parking pass.

ii. The judge misapplied the relevant legal test by failing to consider the evidence about whether Telus was the primary beneficiary of the parking arrangement. Instead, the judge relied upon factual findings made in the *Adler* decision.

iii. In the alternative, the judge erred in finding that Telus was not the primary beneficiary of the parking arrangement.

iv. The judge erred when determining the value of the benefit by failing to properly determine the costs saved by the appellant.

Consideration of the Asserted Errors

[15] Paragraph 6(1)*(a)* is cast in broad terms. It attempts to capture in employment income various fringe or ancillary benefits, whether received in monetary or other form. While the paragraph enumerates five exceptions, none are relevant to this appeal.

[16] In *The Queen v. Savage*, [1983] 2 S.C.R. 428, the Supreme Court held the meaning of the phrase “benefits of any kind whatsoever” in paragraph 6(1)(*a*) was “clearly quite broad” and the phrase “in respect of” was intended to convey the widest possible scope. The paragraph was held to take into income a material acquisition which conferred an economic benefit, so long as the

acquisition did not fall within one of the exceptions, and so long as the acquisition was received in connection with employment.

[17] In *Minister of National Revenue v. Phillips*, [1994] 2 F.C.R. 680 (C.A.) at page 693, this Court expressed the intent of the provision in the following terms:

> An economic advantage received by an employee from his or her employer will be deemed a benefit within the meaning of paragraph 6(1)(*a*) unless the employee can demonstrate that the payment was not a benefit in respect of employment, but made in his or her capacity as a person. Framed in this manner, the test is able to embrace conveniently the categories of gifts, loans and other contractual arrangements.

[18] Once satisfied that something was received by an employee in his or her capacity as an employee, two further questions arise. First, is the receipt a non-taxable reimbursement of an expense incurred as a consequence of employment? Second, does the receipt confer an economic advantage upon the taxpayer?

[19] In respect of the first question, in *Phillips* this Court affirmed the correctness of *Ransom v. Minister of National Revenue*, [1968] 1 Ex.C.R. 293. Ransom established that reimbursement by an employer of a loss suffered by an employee when selling a house following a job transfer is not taxable to the extent the payment by the employer reflects compensation for the employee's actual loss. The Court in *Phillips* clarified, at paragraph 57, that this rule "has no application in a case concerning an expenditure as opposed to a capital loss."

[20] In respect of the second question, this Court confirmed in *Phillips* that to be a taxable benefit a payment must confer an economic advantage on the employee. The Court cautioned, however,

that economic benefit "cannot be assessed on the basis of subjective criteria and that the taxation of benefits cannot be made to depend on the perceptions of individual taxpayers."

[21] In *Attorney General of Canada v. Hoefele*, [1996] 1 F.C. 322 (C.A.) at page 332, this Court restated the requirement that to be taxable as a benefit a receipt must confer an economic benefit on the employee. Of relevance to this appeal is the following passage from the majority reasons, and particularly the caveat found at the end of the passage:

> Therefore, the question to be decided in each of these instances is whether the taxpayer is restored or enriched. […] If, on the whole of a transaction, an employee's economic position is not improved, that is, if the transaction is a zero-sum situation when viewed in its entirety, a receipt is not a benefit and, therefore, is not taxable under paragraph 6(1)*(a)*. It does not make any difference whether the expense is incurred to cover costs of doing the job, of travel associated with work or of a move to a new work location, as long as the employer is not paying for the ordinary, every day expenses of the employee. [Emphasis added.]

[22] *Hoefele* must be read carefully in light of the strong dissent by Justice Robertson. However, the majority and minority differed only on the application of the law to the facts then before the Court. They did not disagree on the applicable legal principles.

[23] A further factor relevant to the economic advantage analysis has been articulated by this Court in cases such as *Lowe v. Canada*, [1996] 2 C.T.C. 33 (F.C.A). If an employee receives an economic advantage, but the primary beneficiary of that receipt is the employer, no benefit arises under paragraph 6(1)*(a)*. At issue in *Lowe* was whether an expense paid trip to New Orleans constituted benefit under paragraph 6(1)*(a)*. At paragraph 15 the Court wrote:

> […] It seems to me in light of existing jurisprudence that no part of the appellant's trip expenses should be regarded as a personal benefit unless that part represents a material acquisition for or something of value to him in an economic sense and that if the part which represents a material acquisition or something of value was a mere incident of what was primarily a business trip it should not be regarded as a taxable benefit within paragraph 6(1)*(a)* of the Act.

[24] Having reviewed the applicable legal principles, I now turn to the asserted errors.

i. Did the Tax Court judge misconstrue or misapply the relevant legal test by failing to consider whether the appellant received an economic benefit or was economically enriched by receiving the parking pass?

[25] Misconstruing or misapplying the relevant legal test is an error of law, reviewable on the standard of correctness.

[26] The appellant submits that the Tax Court judge did not consider whether he received an economic benefit or was economically enriched by receiving the parking pass. He further submits that the Tax Court judge erred by failing to consider the following two arguments.

[27] First, the appellant argued that before receiving the parking pass the appellant commuted to work using public transit. After receiving the pass, he used his car for the daily commute. Comparing the cost of commuting using public transit with the cost of using his car shows that the cost of commuting increased after receiving the pass. Therefore, the appellant was not economically enriched or advantaged. Reliance is placed on the decision in *Hoefele*.

[28] Second, the appellant argued that he did not receive an economic benefit or advantage in relation to other Telus employees of similar rank who did not work at the downtown Edmonton location and who worked at locations where there was no charge for parking.

[29] For the following reasons, I find the appellant failed to demonstrate that the judge erred by failing to consider the existence of an economic benefit or enrichment.

[30] First, the judge adopted and followed the approach taken in *Adler*. In *Adler*, at paragraph 75, the Court found that:

> In the within appeals, the provision of free parking by Telus to the appellants had the obvious effect of eliminating the need for them to pay for the same privilege out of their own pockets. In that sense, and without more, there was a benefit conferred on them that had a fair market value ranging from $1500 to $2800 per year depending on the location of the facility and whether the stall was assigned.

[31] The finding that an economic benefit was conferred was a legal conclusion that flowed from the evidence that Telus provided parking passes to some employees free of charge while other employees had to pay for parking. It was admitted in the present case that the appellant also received his parking pass for free while others paid for parking. The Tax Court judge was entitled to apply the legal finding in *Adler* that, without more, provision of the parking pass in that circumstance conferred an economic benefit.

[32] Second, the Tax Court judge did deal with the conferral of an economic advantage when she moved to consider the valuation of the benefit. She rejected the appellant's argument that the costs he incurred eliminated the economic advantage otherwise conferred by the parking pass.

[33] Third, the appellant's reliance on *Hoefele* is misplaced for two reasons.

[34] For one, as this Court stated in *Phillips*, the existence of an economic benefit cannot be assessed on the basis of subjective criteria. The logical conclusion of the appellant's argument is that the determination of the existence of an economic benefit would be affected by such things as the price and fuel efficiency of each taxpayer's vehicle. This is contrary to Parliament's intent that employees receive equal tax treatment in respect of their employment incomes.

[35] For another, as quoted above, in *Hoefele* the majority cautioned that the concept of economic improvement, or the zero-sum situation, did not apply where the employer pays for ordinary, every day expenses of an employee. Parking of the sort at issue in this case is such an ordinary, every day expense.

[36] Finally, it is inappropriate to compare the appellant with Telus employees who work elsewhere where free parking is available to all. For there to be equal tax treatment in respect of their employment incomes, any comparison should be drawn between the appellant and Telus employees who worked in the appellant's downtown office but who did not receive free parking.

ii. Did the Tax Court judge fail to consider the evidence about whether Telus was the primary beneficiary of the parking arrangement?

[37] The appellant submits the Tax Court judge ignored the evidence before her because she felt she was bound to follow the determination in *Adler* that Telus was not the primary beneficiary of the employer provided parking.

[38] Again, the appellant has failed to demonstrate that the Tax Court judge so erred. A fair reading of the judge's reasons at paragraphs 23 through 29 shows that she considered the relevant evidence in order to see whether the evidence was "sufficient to distinguish the facts from any of the 14 taxpayers in *Adler* who were found to have received a taxable benefit." She found the evidence to be insufficient, primarily because the appellant failed to call his manager to give evidence.

iii. Did the judge err in finding that Telus was not the primary beneficiary of the parking arrangement?

[39] The appellant argues that he provided uncontroverted evidence quantifying the value of the additional overtime hours worked by him, and proving that the value of those hours far exceed the value of the parking pass. Therefore, he submits, Telus received a substantial benefit each year from the additional overtime the appellant worked as a result of receiving the parking pass. In the appellant's submission, in a transaction where one party receives a substantial benefit and the other receives a parking stall of approximately $2,000.00 value, the only reasonable conclusion is that the primary beneficiary is the party who receives the greater benefit.

[40] The finding that Telus was not the primary beneficiary of the parking arrangement is a finding that may only be reversed if the appellant establishes that the trial judge made a palpable and overriding error.

[41] As set out above, the Tax Court judge found the evidence to be insufficient to prove that Telus provided the parking space primarily for business reasons, which I take to mean, to obtain an economic advantage for itself. There is no palpable or overriding error in this finding. In the course of the audit, Telus advised that, generally, free parking was provided to employees in the appellant's pay classification and to others who had a particular need for it. While the appellant may have testified about his understanding of his employer's intent and practices, he was not a disinterested observer. It was open to the Tax Court judge to find, as she did, that it was necessary for the appellant to have called his manager to testify on behalf of Telus.

[42] It follows from the finding the appellant failed to establish that Telus was the primary beneficiary of the use of the parking pass, that there was no need to consider the applicability of cases such as *Lowe* which deal with situations where the primary beneficiary of a benefit is the employer and the benefit to the employee is only incidental.

iv. Did the judge error when determining the value of the benefit?

[43] The appellant argues that while the Tax Court judge correctly followed the cost saved approach, said to be articulated by this Court in *McGoldrick*, she erred by not properly applying the method. The appellant submits that at trial he led evidence about the cost of commuting to work

using public transit. When he received the parking pass, the only cost he saved was the monthly cost of the transit pass. This cost was offset by the cost of operating his car with the result that there was no cost savings to him.

[44] The respondent responds that the Tax Court judge erred by applying the cost saved approach, but that any error was not material because the judge valued the benefit in the amount equal to its fair market value. That is, the benefit was valued as being the amount paid by members of the public who paid to park in the Telus garage.

[45] The passage in *McGoldrick* that gave rise to this issue is found at paragraph 9, where the Court wrote:

> As a general rule, any material acquisition in respect of employment which confers an economic benefit on a taxpayer and does not constitute an exemption falls within paragraph 6(1)*(a)* (see *The Queen v. Savage*, 83 DTC 5409 at 5414 (S.C.C.)). In this case, the benefit is the money saved by the taxpayer in preparing a lunch or in making a food purchase from the casino vending machines while at work. [Emphasis added.]

[46] However, contrary to the submission of the appellant, in the underlined passage the Court was concluding nothing other than that the employee received a benefit within paragraph 6(1)*(a)* of the Act. The Court was not quantifying the value of the benefit. Accordingly, properly applied, *McGoldrick* does not support the appellant's cost saved approach.

[47] The equal treatment of taxpayers is facilitated by valuing their benefits at their fair market value. On an administrative basis, the Canada Revenue Agency recognizes this and instructs employers that where the fair market value of a parking pass cannot be determined, no benefit

should be added to an employee's remuneration. Where the fair market value can be determined, employers are instructed that the value of the benefit is based on the fair market value of the parking pass, less any payment the employee makes to use the space. See: Canada Revenue Agency, *Employers' Guide – Taxable Benefits and Allowances 2009*, T4130(E) Rev. 09.

[48] Given the inherent fairness of this method of valuation, and the absence of objective evidence demonstrating that a fair market value based valuation is somehow inappropriate on the facts of this case, the Tax Court judge did not err by valuing the parking pass in the amount of its fair market value.

Conclusion

[49] For these reasons, I would dismiss the appeal, with costs payable to the respondent.

"Eleanor R. Dawson"

J.A.

“I agree
K. Sharlow J.A.”

“I agree
Carolyn Layden-Stevenson J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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