

Docket: 2015-3969(IT)I

BETWEEN:

MARK SMITH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 19, 2017, at Calgary, Alberta.

Before: The Honourable Justice Sylvain Ouimet

Appearances:

Counsel for the Appellant: Gerald Grenon

Kaitlin Gray

Counsel for the Respondent: Gergely Hegedus

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2011 taxation year is dismissed, without costs.

Signed at Ottawa, Canada, this 21st day of April 2017.

“Sylvain Ouimet”

Ouimet J.

Citation: 2017 TCC 62
Date: 20170421
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Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Quimet J.

I. Introduction

[1] This is an appeal by Mark Smith (“Mr. Smith”) in respect of his 2011 taxation year. The Minister of National Revenue (the “Minister”) reassessed Mr. Smith to include in his income an amount of \$504 pursuant to paragraph 6(1)(a) of the *Income Tax Act* (the “ITA”). The amount of \$504 was included in Mr. Smith’s income as a taxable benefit received in the course of employment and it represents the value of a parking pass at the Calgary airport that was provided to Mr. Smith by Jazz Aviation LP (“Jazz”).

II. Issue

[2] The only issue in this appeal is the following:

Did the Minister correctly determine that Mr. Smith received a taxable employment benefit in the amount of \$504 for the 2011 taxation year?

[3] In answering this question, I will conduct an analysis to determine who was the primary beneficiary of the parking pass, Mr. Smith or Jazz.

III. The Relevant Legislative Provisions

[4] The key applicable provision of the ITA is the following:

6 (1) Amounts to be included as income from office or employment — 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:

(a) **Value of benefits** — the value of board, lodging and other benefits of any kind whatever received or enjoyed by the taxpayer, or by a person who does not deal at arm's length with the taxpayer, in the year in respect of, in the course of, or by virtue of the taxpayer's office or employment, except any benefit

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IV. The Relevant Facts

[5] Mr. Smith, a flight attendant for Jazz, testified at trial. Mr. Smith also called Kirk Newhook ("Mr. Newhook"), the Vice-president of Employee Relations for Jazz. The Respondent called Shawnah Whittaker, the General Manager of Ground Transportation and Parking for the Calgary Airport Authority.

A. Evidence of Kirk Newhook

[6] Mr. Newhook has been employed by Jazz since 1993 and has been involved in the scheduling of the flight crews, that is, pilots and flight attendants. Mr. Newhook has worked in the Jazz operation center. He has also been involved in negotiating collective agreements, including the one between Jazz Aviation LP and the Canadian Flight Attendant Union (the "Collective Agreement").

[7] Jazz, a subsidiary of Air Canada, was described by Mr. Newhook as a feeder airline for Air Canada. Jazz does not sell tickets for its flights itself. Rather, it carries passengers for Air Canada and is compensated by Air Canada for this service. Jazz flies between smaller airports and the larger international airports. Part of its role is to connect passengers from domestic flights, operated by Jazz, to international flights, operated by Air Canada.

[8] Mr. Newhook testified that an important part of Jazz's compensation is the on-time performance incentive, the calculation of which is based on the proportion of its flights that depart on time. The most significant cost for Jazz is the "flight crew variable wage cost", which is to say that its flight crew costs are its highest

costs. Because of Jazz's role as a feeder airline and because of the on-time performance incentive, it is very important to Jazz that flights depart on time. Therefore, it is important that flight attendants report for work on time. Furthermore, when a flight cannot depart on time because a flight attendant has not reported for work, there can be a cascading effect because other flights are delayed as a consequence.

[9] According to Mr. Newhook, since the flights are staffed with the bare minimum crew required in order to fly, if a flight is short a flight attendant it cannot depart. Therefore, Jazz has at all times a number of "reserve" flight attendants who must be able to report within two hours of being called. When a flight attendant does not report, the operation centre may move a flight attendant from a later flight to the one in need of an attendant and then call the "reserve" attendant to report for the later flight. Articles 5.23 and 5.24 of the Collective Agreement provide reserve duty and airport reserve duty for flight attendants so that there are people standing by to replace flight attendants as needed. Jazz typically has about ten percent of its required work force on reserve duty, depending on the day of the week. This is Jazz's insurance policy against delays, cancellations and any failure by flight attendants to report for work. Those on reserve duty must be available for the twenty-four hour period during which they are scheduled to be on reserve duty.

[10] In recruiting new flight attendants, Jazz looks for people who will be reliable and flexible. Throughout the training and review process, Jazz monitors the recruit's flexibility and reliability. Flexibility is important because Jazz wants flight attendants who are capable of changing schedules as needed. Reliability is important because Jazz needs its flight attendants to be punctual. Jazz also promotes a culture of on-time performance by providing to employees bonuses based on "on-time" performance. According to Mr. Newhook, if employees are not reliable, those persons are likely to lose their job.

[11] Mr. Newhook said that Jazz has decided to let the flight attendants decide on the mode of transportation they use in order to be punctual. However, according to Mr. Newhook, Jazz has also decided to continue providing a parking pass to its flight attendants, despite the potential for it to be a taxable benefit, because Jazz does not want its flight attendants to use less reliable alternatives that would result in more stress on the system because of delays.

[12] Mr. Newhook confirmed that Jazz's flight attendants are not required to have a car or driver's licence as a condition of employment. According to Mr. Newhook, having a car is not a condition of employment because a new flight

attendant is likely to make about \$23,000 a year. Since a car is a significant expense, it would be difficult to recruit people if having a car was a requirement. In any event, pursuant to Article 7.04 of the Collective Agreement, flight attendants are provided with a parking pass paid for by Jazz. Mr. Newhook testified that this provision was already in the Collective Agreement when he joined Jazz in 1993 and that he did not know why Article 7.04 was put in. Article 7.03 of the Collective Agreement stipulates that Jazz will provide company transportation, cabs, limos, or other suitable transportation to flight attendants who are required to report for duty, or who arrive back from a trip, between the hours of 00:30 a.m. and 04:30 a.m. Jazz will also sometimes pay for taxis, for example, late at night to take employees to their parked car or when a flight attendant is being called in to work on a day off and has no other way to get to work.

B. Evidence of Mark Smith

[13] Mr. Smith has been a flight attendant for approximately twenty-five years. He is based out of the Calgary airport and resides in Calgary.

[14] In 2011, Mr. Smith commuted to work by driving to the Calgary airport and parking in the “Green Lot”. This drive took him approximately twenty-five minutes without traffic. Mr. Smith testified that there was no direct public transportation route from his home to the airport in 2011. He never carpooled or took a taxi to work. His parking pass for the Green Lot was paid for by Jazz and the cost of the parking pass was \$40 per month plus GST.

[15] Mr. Smith also confirmed that he did not have to use his car to perform his work; he only used it to commute to work. Mr. Smith testified that, if Jazz did not pay for the parking, he “would explore all options available”, without saying what they might be, other than paying for it out of his own pocket.

[16] Mr. Smith submitted in evidence at trial his Payroll Summary for the 2011 calendar year. The Payroll Summary shows the times at which Mr. Smith was on duty and off duty. According to the Summary, he did not have what could be called a “normal” schedule; his hours of work fluctuated from week to week and month to month. Mr. Smith could also be required to begin work early and finish late. In 2011, for example, he was required to start work as early as 5:00 a.m. and to finish as late as 11:36 p.m.

[17] It was important for Mr. Smith to report for work on time. There was a three-strike rule: if Mr. Smith failed to report to work on time, he would be disciplined. If it occurred three times, he would be terminated.

[18] Mr. Smith testified that he used his parking pass two or three times for personal purposes, such as flying for a vacation. He did not reimburse Jazz for this use of the parking pass.

[19] According to the evidence submitted at trial, there was no public transportation to the airport available for early morning flights. However, this evidence was based on the 2017 public transportation schedule, not the 2011 schedule. There was also evidence that the precise routes examined at the hearing would not have been available in 2011 because the routes and stations have since changed.

[20] Mr. Smith submitted a Calgary Transit Map from 2011. This map shows two buses going to the Calgary Airport: routes number 430 and number 57. The schedule for route number 430 showed the earliest bus arriving at the airport at 5:53 a.m. on weekdays and the last bus leaving the airport at 12:23 a.m. on weekdays, with a more limited schedule on weekends. The schedule for route number 57 was not submitted.

[21] In addition, a new airport route, number 300, was launched on June 27, 2011. The schedule for route 300 showed that on all days of the week the earliest bus arrived at the airport at 5:25 a.m., and the last bus left the airport at 12:05 a.m. However, the evidence from 2017 suggests that, from where he resided in 2011, it would not have been possible for Mr. Smith to use the 300 route at that time in the morning because he needed to catch a connecting bus.

C. Evidence of Shawnah Whittaker

[22] Ms. Whittaker is the General Manager of Ground Transportation and Parking for the Calgary Airport Authority. As the general manager, she is in charge of all parking at the Calgary airport and all aspects of ground transportation to and from the airport. Ms. Whittaker has worked for the Calgary Airport Authority in the Ground Transportation and Parking Department for the past 20 years approximately.

[23] Ms. Whittaker testified that all persons employed at the Calgary airport can obtain a parking permit. To her knowledge, most flight attendants working at the Calgary airport are provided with parking by their employer, including those working for Jazz.

[24] Today, there are a number of parking lots at the Calgary airport. Generally, the closer the lot is to the terminal, the more expensive the parking is. However, in

2011, the only options for a Jazz employee were the Green Lot and the White Lot. Jazz provided parking for its employees in the Green Lot. The Green Lot has over 2500 parking spaces. It never fills up completely. The cost to park in that lot in 2011 was \$40 (\$42 with GST). The lot was accessible twenty-four hours a day, seven days a week. As for the White Lot, which is known as the corporate lot, it is heated and much more expensive, and cost \$240 per month in 2011.

[25] Typically, in 2011, if persons who worked at the Calgary airport wanted a parking space at the airport, they had to fill out a parking permit application and submit it to the parking office. In 2011, when it was the employer who paid, that employer had to sign off on the parking and was billed directly. However, it was open to all who worked at the Calgary airport to pay for their own parking permit when their employer did not provide one. In addition, employees who wanted to obtain a parking permit in a closer lot at a higher price could do so, but had to pay out of their own pocket. In that case, the Calgary Airport Authority did not subtract the amount that the employer was willing to pay for the parking space.

V. Analysis

[26] As stated by the Supreme Court of Canada in *Savage*,¹ the rule is that any material acquisition in respect of employment which confers an economic benefit on a taxpayer falls within paragraph 6(1)(a) of the ITA and therefore is a taxable benefit, unless there is an exemption. Justice Dickson stated the following in that decision:²

I agree with what was said by Evans JA in *R. v. Poynton*, [1972] 3 O.R. 727 at p. 738, speaking of benefits received or enjoyed in respect of, in the course of, or by virtue of an office or employment:

I do not believe the language to be restricted to benefits that are related to the office or employment in the sense that they represent [*sic*] a form of remuneration for services rendered. If it is a material acquisition which confers an economic benefit on the taxpayer and does not constitute an exemption, *e.g.*, loan or gift, then it is within the all-embracing definition of s.3.

[27] In *McGoldrick*,³ the Federal Court of Appeal (“FCA”) stated that one exception to the rule is where the material acquisition at issue was provided to the

¹ *R v Savage*, [1983] 2 SCR 428, [1983] CTC 393.

² *Ibid.* at 441.

³ *McGoldrick v The Queen*, 2004, FCA 189.

employee primarily for the benefit of the employer. If this is the case, even if the employee enjoyed a personal benefit from the use of this acquisition, that benefit is not taxable:⁴

9 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.)). . . . Where something is provided to an employee primarily for the benefit of the employer, it will not be a taxable benefit if any personal enjoyment is merely incidental to the business purpose (see *Lowe v. The Queen*, 96 DTC 6226 at 6230). . . .

[28] In the present case, Mr. Smith argued that the parking pass at the Calgary airport was provided to him by Jazz primarily for Jazz's benefit. The Respondent argued that it was Mr. Smith who primarily enjoyed the benefit of the parking pass.

[29] In light of what is stated above, in order to determine whether the value of the parking pass provided to Mr. Smith by Jazz was a taxable benefit, this Court has to determine, on the balance of probabilities, if Mr. Smith was the primary beneficiary of the parking pass or if the primary beneficiary was Jazz, the employer.⁵

A. Benefit to Jazz

[30] In his testimony, Mr. Newhook said that it was important for Jazz that its flight attendants report to work on time for two main reasons:

- a) An important part of Jazz's compensation was the on-time performance incentive, which was calculated on the proportion of flights that departed on time.
- b) Jazz flights are staffed with the bare minimum crew required in order to fly. If a flight is short a flight attendant, it cannot depart and this has a cascading effect because other flights might have to be delayed as a consequence.

[31] Furthermore, Jazz's operational requirements made it important that flight attendants be reliable and flexible for various other business-related reasons.

⁴ Ibid. at par 9.

⁵ See *Lowe v R*, [1996] 2 CTC 33 at 42, 96 DTC 6226 at 6230 (FCA).

[32] On the evidence, I cannot conclude that Jazz paid for parking passes because it believed that it would thereby make flight attendants, including Mr. Smith, more reliable and flexible.

[33] According to Mr. Newhook, given how important it was for Jazz that its flight attendants report to work on time, Jazz put in place a measure to ensure that, if a flight attendant did not report to work on time for any reason, that flight attendant could be replaced without there being any repercussions on Jazz's flight schedule. This measure or "insurance policy" consisted in Jazz scheduling approximately ten percent of its required work force to be on "reserve" duty. This requirement is found in Articles 5.23 and 5.24 of the Collective Agreement.

[34] Pursuant to Article 7.03 of the Collective Agreement, Jazz had to provide company transportation, cabs, limos, or other suitable transportation to flight attendants required to report for duty, or who arrived back from a trip, between the hours of 00:30 a.m. and 04:30 a.m. Pursuant to Article 7.04 of the Collective Agreement, Jazz had to pay for its flight attendants' parking passes. Mr. Newhook did not testify that Articles 7.03 and 7.04 were measures or insurance policies against failure by flight attendants to report to work on time as he did with regard to Articles 5.23 and 5.24. What Mr. Newhook said about Article 7.04 was that it was historically included in the Collective Agreement, meaning it was there before he joined Jazz in 1993.

[35] Mr. Newhook also said that Jazz had decided to let the flight attendants decide what mode of transportation they would use in order to be punctual. Mr. Newhook's evidence was not that Jazz paid for the flight attendants' parking passes because of any commercial realities of the airline industry or any factors specific to that industry, as argued by Mr. Smith's counsel.

[36] It is noteworthy that, despite the fact that it was important for Jazz that its flight attendants be reliable and flexible and that they report to work on time, the evidence does not show that flight attendants were required under the Collective Agreement or otherwise to commute to work by car or even to have a driver's licence.

[37] This does not mean, however, that Jazz did not receive any benefit from its flight attendants using the parking passes. I must therefore look for evidence of correlation between the use of the parking passes and any benefit to Jazz.

[38] Mr. Newhook said in his testimony that Jazz had decided to continue paying for the parking passes despite their potentially constituting a taxable benefit.

According to Mr. Newhook, this was because Jazz did not want its flight attendants to use less reliable alternatives. I was not provided with any evidence to support a conclusion that flight attendants using a car to commute to work at the Calgary airport were more reliable than those using other means of transportation to do so. In the 2011 taxation year, the Collective Agreement which required Jazz to pay for the parking passes was in place. In the 2011 taxation year, whether they were a taxable benefit or not, Jazz had to pay for the parking passes pursuant to the Collective Agreement.

[39] After reviewing the evidence, I have concluded that I was not presented with any evidence of a correlation between the use of the parking lot at the Calgary airport by flight attendants and the existence of a benefit to Jazz. The evidence did not show that flight attendants who commuted to the Calgary airport using their own car were more reliable and flexible than those using other means of transportation. On the evidence, I conclude that Jazz received the same level of service from its flight attendants, no matter how they chose to commute to work.

[40] In the case of Mr. Smith, he had to commute to the Calgary airport by car. Therefore, he had to have a parking pass in order to work for Jazz out of the Calgary airport and, obviously, in order to report to work on time. Therefore, Mr. Smith's using his parking pass allowed Jazz to have Mr. Smith as an employee.

[41] The evidence of Mr. Smith was that he commuted to work by driving to the Calgary airport because he could not use public transportation, as it was not available at the hours that he needed it. In some instances, public transportation was available but would have been impractical for Mr. Smith to use.

[42] Mr. Smith testified that, if Jazz had not paid for the parking pass, he would have considered other options. While he stated that he would have considered other options, he did not mention what they were, with the exception of the option that consisted of paying for a parking pass out of his own pocket. On the evidence, I fail to see what the other options might have been besides paying for the parking out of his own pocket. In my opinion and according to the evidence, the distance between his house and the Calgary airport combined with his work schedule left Mr. Smith with only one choice for commuting to work: use of his own car and use of the parking made available to him at the airport, whether Jazz was paying for it or not.

[43] In the end, I was not presented with evidence of any correlation between the use of parking at the Calgary airport and a benefit to Jazz either for the flight attendants in general or for Mr. Smith particularly. Since the evidence is not that

Mr. Smith did not perform the same tasks and duties as other flight attendants, I cannot conclude that the work of Mr. Smith in particular provided any specific benefit to Jazz in comparison with the work done by any other flight attendant. Furthermore, there is no evidence of the cost associated with replacing Mr. Smith upon a hypothetical termination of his employment; nor is there any evidence that he would be difficult to replace.

[44] Finally, Mr. Smith's counsel submitted that paying for the parking pass allowed Jazz to further the attainment of its goal of on-time performance and allowed its flight attendants to be more reliable, flexible and punctual. This resulted in increased profits and decreased costs and was good for Jazz's "bottom line". He further argued that flight attendants being more reliable, flexible and punctual improved Jazz's on-time performance and therefore increased its compensation from Air Canada. I was not presented with any evidence that supports these conclusions or that quantifies the effect on Jazz's profits or costs of the use of a parking pass by Mr. Smith and/or other flight attendants.

[45] In light of my analysis of the evidence, I cannot conclude that Jazz received any benefit from Mr. Smith's use of the parking pass provided by it.

B. Benefit to Mr. Smith

[46] As previously mentioned, I have concluded that Mr. Smith had to use his car, and therefore had to have a parking pass, in order to work for Jazz out of the Calgary airport, and this would have been the case whether Jazz was paying for the parking pass or not. Because of this and given the evidence, I have concluded that Mr. Smith received only one benefit from the fact that his parking pass was being paid for by Jazz. That benefit was an economic benefit that is measurable in monetary terms. The value of the benefit is the total value of the parking pass for the 2011 taxation year, that is, \$504. Mr. Smith would have enjoyed all other potential benefits arising from the use of the parking pass in any event as he would have used such a pass even if Jazz had not paid for it. If the evidence had been that he would have taken the bus, for example, if Jazz had not paid for the parking pass, my conclusion would not have been the same since, in that case, he would most probably have enjoyed other benefits arising from the use of a car instead of the bus.

VI. Conclusion

[47] On the evidence, I have come to the conclusion that, on the balance of probabilities, the primary beneficiary of the parking pass at the Calgary airport was Mr. Smith. Mr. Smith received an economic benefit that was measurable in monetary terms. The value of the benefit is the value of the parking pass for the 2011 taxation year, that is, \$504.

[48] I cannot conclude that Jazz paid for the parking pass for any business purpose. The obligation to pay for the parking pass is found in the Collective Agreement, but no explanation was provided to me as to why it was included in the Collective Agreement. The only conclusion I can reach is that Jazz paid for the parking pass simply because it was required to do so pursuant to the Collective Agreement. As for a potential increase in the reliability and flexibility of flight attendants, including Mr. Smith, by virtue of their commuting by car to their place of work, the evidence did not show that there actually was such an increase. In the end, the evidence did not show that Jazz received any benefit at all from Mr. Smith's use of the parking pass.

[49] For these reasons, the appeal is dismissed, without costs.

Signed at Ottawa, Canada, this 21st day of April 2017.

“Sylvain Ouimet”

Ouimet J.

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