Docket: 2005-2917(IT)I

BETWEEN:

RICHARD PARENTEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on March 28, 2006, at Sherbrooke, Quebec.
Before: The Honourable Justice Pierre R. Dussault

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Annick Provencher

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2002 (post-bankruptcy) and 2003 taxation years are allowed, and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the value of the benefit to the Appellant, resulting from the occupancy of a condominium made available to him by his employer, is $7,903 for each of the years, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 16th day of June 2006.

"P. R. Dussault"

Dussault J.

Translation certified true
on this 20th day of February 2008.

Brian McCordick, Translator

Citation: 2006TCC333
Date: 20060616
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BETWEEN:

RICHARD PARENTEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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REASONS FOR JUDGMENT

Dussault J.

[1] These appeals from reassessments under the *Income Tax Act* ("the Act") in respect of the 2002 (post-bankruptcy) and 2003 taxation years were heard under the informal procedure.

[2] In his post-bankruptcy income tax return for the 2002 taxation year, and his income tax return for the 2003 taxation year, the Appellant reported an employment-related taxable benefit of $5,250 in relation to the occupancy of a condominium located at 60, rue du Lac, unit 401, in Magog, Quebec, which his employer made available to him.

[3] In his reassessments, the Minister of National Revenue ("the Minister") increased the Appellant's reported income by $7,098 for each of the years 2002 (post-bankruptcy) and 2003.

[4] In reassessing the Appellant, the Minister relied on the facts set out in subparagraphs 7(a) through (l) of the Amended Reply to the Notice of Appeal (the "Amended Reply"). These subparagraphs read:

[TRANSLATION]

(a) During the period in issue, the Appellant was an employee . . . of Can-Am Immigration Services Inc. ("CAIS").

(b) During the period in issue, CAIS made a condo of which it was the lessee available to the Appellant ("the Condo"). The Condo is located at 60, rue du Lac, unit 401, Magog.

(c) Under an agreement signed on January 15, 2001 by CAIS (represented by the Appellant) and 9047-9692 Québec Inc. (represented by Daniel Leblanc), the rental payments for the Condo were set at $2,000 per month and were non-refundable.

(d) In the event that CAIS purchased the condo, a part of the rent paid, specifically $1,000 per month paid, would be deducted from the purchase price.

(e) CAIS did not purchase the condo.

(f) The monthly taxable benefit in respect of the housing was calculated as follows:

(i)	area of the 4½-room condo	1,020 sq. ft.
(ii)	work room used for business	120 sq. ft.
(iii)	area of condo for personal use	900 sq. ft.
(iv)	$2,000 x (900/1,020) =	$1,764

(g) Since the Appellant made an assignment of his property on May 23, 2002, the taxable benefit of $21,168 ($1,764 x 12) is broken down as follows in respect of the Condo for the 2002 taxation year:

(i)	pre-bankruptcy tax return (5 months x $1,764)	$8,820
(ii)	post-bankruptcy tax return (7 months x $1,764)	$12,348
		$21,168

> (h) The Appellant reported $5,250 as a taxable benefit related to the use of the Condo in his post-bankruptcy income tax return for the 2002 taxation year.
>
> (i) The Appellant was discharged from bankruptcy on February 24, 2003.
>
> (j) CAIS went bankrupt on August 1, 2003, and therefore ceased, from that point onward, to pay the Condo rent for the benefit of the Appellant.
>
> (k) For the 2003 taxation year, the taxable benefit in respect of the Condo is $12,348 ($1,764 x 7 months).
>
> (l) The Appellant reported a total taxable benefit of $5,250 related to the use of the Condo in his tax return for the 2003 taxation year.

[5] Paragraph 8 of the Amended Reply is also relevant. It reads:

> [TRANSLATION]
>
> At this stage in the proceedings, he submits that CAIS paid the electrical bills associated with the Condo occupied by the Appellant.

[6] The witnesses were the Appellant and Guy Potvin, a Canada Customs and Revenue Agency auditor at the relevant time.

[7] In 2001, the Appellant was the Chief Executive Officer of Can-Am Immigration Services 2000 Inc.[1] ("Can-Am") and his son was the sole shareholder and director of that corporation. On January 15, 2001, an agreement was signed between Can-Am, represented by the Appellant, and 9047-9692 Québec Inc., represented by Daniel Leblanc, in relation to an offer to purchase the condominium situated at 60, rue du Parc, unit 401, in Magog. According to the Appellant, Can-Am wished to purchase the condominium in order to make it available to him (Exhibit A-9). The agreement is drafted as follows:

> [TRANSLATION]
>
> . . .
>
> RE: Purchase Offer # PA 66522
> Property situated at 60, rue du Lac, unit 401, Magog
>
> The parties agree as follows:

[1] Although CAIS is called "Can-Am Immigration Services Inc." in the Amended Reply, the financial statements tendered in evidence use the corporate name "Can-Am Immigration Services 2000 Inc." (Exhibit A-8) and other documents contain the corporate name "Can-Am Immigration 2000 Inc." (Exhibit A-9)

> The parties understand and agree that 9047-9692 Québec Inc., represented by Daniel Leblanc, shall defer the deed to a later date.
>
> Consequently, the purchaser, Can-Am Immigration 2000 Inc., shall pay a non-refundable rent in the amount of two thousand dollars ($2,000) per month. However, should the property be purchased, a portion of the rent paid, namely one thousand dollars ($1,000) per month paid, shall be deducted from the selling price.
>
> The parties accept these terms and conditions.
>
> Signed at Magog, January 15, 2001.
>
> . . .

[8] According to the Appellant, Can-Am wished to purchase the condominium in 2001, in 2002, and, lastly, in 2003. Apparently, the selling price was $235,000 or $240,000. Although the building that housed the condominium was on Lake Memphremagog, and was a few minutes from the Magog town centre, where Can-Am's office was located, it was close to a railway, which reduced its value. According to the Appellant, the condominium was a four-and-a-half room, 1,013 square-foot apartment. For reasons that were not explained, the purchase never took place and Can-Am went bankrupt on August 1, 2003.

[9] On the Can-Am balance sheet, the $1,000 per month that was to be applied against the eventual purchase price of the property was entered under the heading [TRANSLATION] "Investments – Advances on purchase of a condominium" (Exhibit A-8).

[10] According to the Appellant, Can-Am did not pay the agreed-upon $2,000 rent for April, May, June and July 2003.

[11] During the period in which Can-Am made the condominium available to the Appellant, it also paid the electrical bills. According to the Appellant, electricity cost $77 per month in 2006 (Exhibit A-2). No information was provided for the years 2002 and 2003.

[12] After Can-Am went bankrupt, the corporation that owned the condominium rented it to the Appellant's new spouse for $1,200 per month starting August 1, 2003, for a period of 11 months (Exhibit A-9). As of July 1, 2004, the rent was increased to $1,217 per month (Exhibit A-9).

[13] The Appellant acquired the condominium in 2005 for the sum of $220,000.

[14] Mr. Potvin, the auditor, explained that he initially tried to establish the rental value of the condominium made available to the Appellant during the years 2002 and 2003, but ultimately established the taxable benefit by using Can-Am's rental cost ($2,000) as a basis, multiplied by the area that the Appellant used for personal purposes (900 square feet), divided by the total area of the condominium (1,020 square feet). According to this calculation, the taxable benefit was established at $1,764 per month. In addition, Mr. Potvin stated that Can-Am was not entitled to capitalize $1,000 per month because it never purchased the condominium.

[15] Counsel for the Respondent relies, *inter alia*, on the decision of the Federal Court of Appeal in *Youngman v. Canada*, [1990] F.C.J. No. 341 (QL), in support of her argument that Can-Am's non-refundable rental cost of $2,000 per month should be used as the basis for the calculation. Furthermore, she states that since the Appellant obtained a benefit regardless of Can-Am's failure to pay the rent for the four months preceding its bankruptcy, no reduction is warranted in this regard. She adds that even if Can-Am had purchased the condominium, this would also have been a benefit to the Appellant.

[16] In *Youngman*, *supra*, the appellant had a luxurious custom-made home built at a cost of $395,500, by a corporation of which he and his wife were shareholders, on land owned by that corporation. The appellant lent $86,000 to the corporation to help it finance the construction.

[17] In 1979, the appellant paid $800 per month in rent to the corporation, plus $300 per month in other expenses related to the property, for a total of $12,100 over the course of the year. The corporation paid the mortgage interest, municipal taxes and insurance, which totalled $8,799. The assessment was based on these costs paid by the corporation, plus an amount of $28,452, which represented a 9% rate of return on $316,135, which was considered to be the corporation's investment in the residence. The total benefit of $37,251 was divided between the appellant and his wife ($18,625 each) and, the $12,100 that the appellant paid as rent and other expenses was subtracted from his share.

[18] At trial, the appellant had adduced expert testimony on the rental value of the house. One expert established the rental value at $800 per month, plus utilities. The other expert estimated the value at roughly $950 per month. At paragraph 8 of the decision of the Federal Court of Appeal, Pratte J.A. made the following comments regarding the experts' testimony:

> . . . Both agreed that there was no comparable house on the market in the area. One said that, in that area, the free market rental value of houses bore no relation to their real value.

[19] Following this, at paragraph 9 of the decision of the Federal Court of Appeal, Pratte J.A. explained the basic argument that the appellant raised at trial and the way in which the judge dealt with the argument:

> 9. The appellant's basic argument at trial was that the assessment was wrong because, instead of being based on the value of the benefit that the appellant had received from his company - which value was established by the uncontradicted evidence of the two experts - it was based on the costs that the company had incurred to provide him with that benefit. The Trial Judge rejected that argument. He first found that the appellant's company had not built the house for a business purpose since, in his view, it had been, from the outset, built for the personal use of the appellant. He also found that, in the circumstances, the fair market rental value was totally inappropriate for measuring the value of the benefit conferred on the appellant because that fair market rental value bore no relation to the actual costs of that benefit.

[20] The appellant invoked the same argument before the Federal Court of Appeal. Here is how Pratte J.A. addressed it at paragraphs 17 to 19 of the decision:

> 17. The appellant's main proposition is that, under paragraph 15(1)(*c*), what is to be added to the income of the shareholder is the value of the benefit that he received rather than the cost of that benefit to the corporation. That proposition is certainly well founded. However, it does not support the appellant's conclusion. In determining the value of benefit, one may take its cost into consideration. Free market value is not, in all circumstances, the sole indication of real value.
>
> 18. It is now well settled that paragraph 15(1)(*c*) applies only when a shareholder has received, *qua* shareholder, a benefit or advantage from a corporation. In valuing a benefit allegedly received by a shareholder, it is therefore necessary to find what the shareholder would have had to pay for the same benefit in the same circumstances if he had not been a shareholder of the company. A shareholder receives no benefit for the

> purposes of paragraph 15(1)(*c*) if, in the same circumstances, he would have received the same benefit from a company of which he is not a shareholder. For instance, if a company builds an expensive house with the intention of selling it at a profit and later, after realizing that it cannot be sold for more than half its cost, sells it at that low price to one of its shareholders, that shareholder in all likelihood certainly gets a benefit out of that transaction but paragraph 15(1)(*c*) does not apply to it.

Note 2: *M.N.R. v. Pillsbury Holdings Ltd.*, [1964] C.T.C. 294.

> 19. In order to assess the value of a benefit, for the purposes of paragraph 15(1)(c), it is first necessary to determine what that benefit is or, in other words, what the company did for its shareholder; second, it is necessary to find what price the shareholder would have had to pay, in similar circumstances, to get the same benefit from a company of which he was not a shareholder. In the present case, the benefit or advantage conferred on the appellant was not merely the right to use or occupy a house for as long as he wished; it was the right to use or occupy for as long as he wished a house that the company, at his request, had built specially for him in accordance with his specifications. How much would the appellant have had to pay for the same advantage if he had not been a shareholder of the company? Certainly more than what the two experts referred to as the free market rental value since, in my view, the company would have then charged a rent sufficient to produce a decent return on its investment. It is impossible to determine with accuracy the amount of that rent. However, subject to one important reservation, I cannot say that it would have been less than what the Minister assumed it to be. That reservation is that if the appellant had been dealing with a company of which he was not a shareholder, consideration would certainly have been given, in determining the rent payable, to the fact that he had himself lent more than $100,000 without interest to the company in order to help to finance the construction of the house. As long as that loan remained outstanding, the rent otherwise payable would, in my view, have been reduced by an amount equal to the interest that should normally have been paid on the balance of the loan.
>
> [Emphasis added.]

[21] It can therefore be concluded that where a corporation confers a benefit on a shareholder by making a residence or dwelling available to that shareholder, one must try to determine "what the shareholder would have had to pay for the same benefit in the same circumstances if he had not been a shareholder of the company." (*Youngman*, *supra*, at paragraph 18).

[22] As far as employees are concerned, paragraph 6(1)(*a*) of the Act also prescribes that the value of the board, lodging or other benefit of any kind received

or enjoyed by them in the year must be included in their income, subject to the specified exceptions. Thus, in my opinion, it is appropriate to determine the value of lodging made available to an employee free of charge based on the amount that he would have had to pay a third party for similar lodging.

[23] This is, in fact, the position adopted by the tax authorities in Interpretation Bulletin IT-470R (Consolidated), *Employees' Fringe Benefits*, dated October 10, 1999. Indeed, paragraph 6 of the Bulletin states:

> **Rent-Free and Low-Rent Housing**
>
> 6. When an employer provides a house, apartment, or similar accommodation to an employee rent-free or for a lower rent than the employee would have to pay someone else for such accommodation, the employee receives a taxable benefit. The employer is responsible for reasonably estimating the amount of such a benefit, which would normally be considered to be the fair market rent for equivalent accommodation had the employee rented from a third party, less any rent paid. . .
>
> [Emphasis added.]

[24] In the case at bar, we know that Can-Am wished to purchase the condominium starting in 2001 under a purchase offer that seems to have been accepted, but that the seller and Can-Am agreed, *inter alia*, to defer the deed of sale to a later date under the agreement signed on January 15, 2001 (Exhibit A-9). However, Can-Am agreed to pay $2,000 in non-refundable monthly rent. In the event that the property was purchased, an amount of $1,000 for each month of rent paid was to be deducted from the selling price.

[25] Unlike counsel for the Respondent, I do not believe that the purchase of the condominium would have benefited the Appellant. Can-Am would have become the owner and could have realized a gain upon resale. In the agreement of January 15, 2001, Can-Am reserved the option to purchase the condominium at any time. But that is not the issue, nor is the issue whether Can-Am was entitled to capitalize $1,000 per month as an advance on the purchase of the condominium.

[26] Rather, the issue here is the value of the benefit received and enjoyed by the Appellant during the years 2002 and 2003 by reason of Can-Am making the condominium in Magog available to him free of charge and paying the electrical bills during those years.

[27] What must be determined on this point is the price that he would have had to pay in order to rent a similar condominium and cover the electrical bills himself. And the evidence discloses that an 11-month lease for $1,200 per month was signed by the Appellant's new spouse and 9047-9692 Québec Inc., the owner of the condominium, on August 1, 2003 (Exhibit A-9). The lease was renewed for 12 months on July 1, 2004 (Exhibit A-9). I emphasize that these were contracts between people who were dealing with each other at arm's length, and that I have absolutely no evidence suggesting that the corporation that owned the condominium granted a special price or rebate on the rent. Moreover, according to the Appellant, there were no $2,000-per-month rentals in Magog in 2002 and 2003. As I have already stated, the condominium is a four-and-a-half room apartment that is slightly larger than 1,000 square feet.

[28] Under the circumstances, I find that the Appellant would likely have had to pay $1,200, in 2002 and 2003, to rent the condominium that Can-Am made available to him free of charge.

[29] The fact that Can-Am did not pay the rent from April to July 2003 should not reduce the benefit, as the Appellant continued to occupy the condominium, and Can-Am continued to be liable for the rent.

[30] Mr. Potvin's breakdown between the area of the condo used for personal purposes and the area used for business purposes, and the determination of the taxable benefit based solely on the part used for personal purposes, was not the subject of any debate. Thus, I will make no pronouncements on the merits of the auditor's breakdown under the circumstances. Using this same apportionment, but with a $1,200 monthly rental cost instead of a $2,000 monthly rental cost as the basis, I find that the value of the benefit is $1,059 per month ($1,200 x 900/1,020).

[31] As for the electrical expenses paid by Can-Am, the Appellant has shown that they were $77 per month in 2006 (Exhibit A-2). In the absence of more accurate information, I believe that $70 per month cannot be too far off the mark as an estimate for 2002 and 2003, so I am fixing these expenses at $70 per month.

[32] The total value of the benefit to the Appellant is therefore $1,129 per month, and $7,903 for each of the years 2002 (post-bankruptcy) and 2003. In light of the foregoing, the appeals from the assessments made under the Act for the 2002 (post-bankruptcy) and 2003 taxation years are allowed, and the assessments are referred back to the Minister for reconsideration and reassessment on the basis that the value of the benefit to the Appellant, resulting from the occupancy of a

condominium made available to him by his employer, is $7,903 for each of those years.

Signed at Ottawa, Canada, this 16th day of June 2006.

"P. R. Dussault"

Dussault J.

Translation certified true
on this 20th day of February 2008.

Brian McCordick, Translator

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APPEARANCES:

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Counsel for the Respondent:	Annick Provencher

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