

2007-839(IT)I

IN THE TAX COURT OF CANADA
IN RE: THE INCOME TAX ACT

BETWEEN:

GORDON CAMERON

APPLICANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

HEARD BEFORE: The Honourable Justice B. Paris

PLACE HEARD: Halifax, Nova Scotia

DATE HEARD: Friday, October 12, 2007

COUNSEL: Mr. Derek A. Simon
Solicitor for the Applicant

Ms. Devon Peavoy
Solicitor for the Respondent

THE REGISTRAR: Ms. Trisha Egan

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I N D E X O F P R O C E E D I N G S

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PARIS, B. (ORAL REASONS).....3

1 **PARIS, B. (Orally):** Good morning, Mr.
2 Simon, Ms. Peavoy.

3 **MS. PEAVOY:** Good morning, Your Honour.

4 **MR. SIMON:** Good morning.

5 **HIS HONOUR:** This is an appeal from re-
6 assessments of the Appellant's 2003 and 2004 taxation
7 years whereby the Minister of National Revenue included
8 certain amounts in the Appellant's income in respect of
9 benefits received by him as officer of Southwest Motors
10 Limited.

11 The alleged benefit consisted of the
12 payment by Southwest of rent, utilities and cleaning for a
13 residence occupied by the Appellant in Yarmouth, Nova
14 Scotia. The amount of these payments was \$8,960 in 2003
15 and \$9,700 in 2004.

16 The issue in this appeal is whether these
17 payments gave rise to a benefit to the Appellant within
18 the meaning of paragraph 6(1)(a) of the *Income Tax Act*.
19 The relevant portion of that provision reads as follows:

20 6(1) There shall be included in
21 computing the income of a taxpayer for
22 a taxation year as income from an
23 office or employment such of the
24 following amounts as are applicable:

25 (a) the value

4 THE COURT - ORAL DECISION

1 of board, lodging and other
2 benefits of any kind whatever
3 received or enjoyed by the
4 taxpayer in the year in respect
5 of, in the course of, or by
6 virtue of an office or
7 employment."

8 The Appellant maintains that he received no
9 taxable benefit as a result of Southwest paying the
10 accommodation expenses because the rental of the premises
11 was primarily for the benefit of Southwest and not for his
12 personal benefit. The Appellant had his own residence in
13 Amherst, Nova Scotia but was required to stay during the
14 week in Yarmouth where Southwest operated a car
15 dealership. Yarmouth is about a six or seven hour drive
16 from Amherst.

17 The evidence showed that the Appellant and
18 a second individual, John Ryerson incorporated Southwest
19 in late 2002 to operate a Honda dealership in Yarmouth
20 where a dealership had become available. The Appellant,
21 either personally or through his consulting firm, Gordon
22 Cameron and Associates, Inc., provided most if not all the
23 funding required to set up the business.

24 The Appellant initially owned a majority of
25 Southwest shares and acquired the remaining shares from

1 Ryerson in early 2004. The Appellant was, at all times, a
2 Director and the President of Southwest.

3 The Appellant said that he and Mr. Ryerson
4 intended that Mr. Ryerson would run the day-to-day
5 dealership operation in Yarmouth and that the Appellant
6 would work every other week for the company. The
7 Appellant said he intended to provide services to
8 Southwest through his consulting firm and that Southwest
9 would be invoiced for his services and would pay his
10 expenses and accommodation in Yarmouth. No written
11 contract was drawn up and no amounts were paid by
12 Southwest to Gordon Cameron and Associates.

13 The Appellant said that his fees were to be
14 paid out of Southwest's profits but, since Southwest
15 didn't make money, no fees were paid.

16 In the Appellant's tax returns for the
17 years before me, the Appellant reported a standby charge
18 to him from Southwest for an automobile provided to him by
19 that company. The Appellant said that he received T4A
20 forms from Southwest in respect of the automobile benefit
21 which would indicate the benefits were considered to be
22 received in the course of or by virtue of an office or
23 employment with Southwest.

24 From 2002 on, the Appellant spent a great
25 deal of time in Yarmouth. From the Spring of 2003 to the

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1 end of that year, he also worked at a subdealership set up
2 by Southwest in Digby.

3 The Appellant took over Ryerson's position
4 at Southwest in September, 2003 because he was unhappy
5 with the latter's performance. From the evidence before
6 me, it appears that the Appellant spent all weekdays and
7 one Saturday per month in Yarmouth and Digby (or traveling
8 to and from those places) working on Southwest business.

9 The Appellant rented an apartment in
10 Yarmouth at some point in the Fall of 2002, when the
11 dealership was being set up. The Appellant said that the
12 apartment was simply a place to sleep that was close to
13 the dealership and cost less than it would have cost him
14 to stay in a hotel while in Yarmouth.

15 The apartment was approximately 800 square
16 feet, had two bedrooms, a kitchen, bathroom and a living
17 room and was about a five minute drive to the dealership.
18 The lease for the apartment was in the Appellant's name
19 but Southwest paid the rent and utilities and for a
20 cleaner, as needed.

21 The Appellant said that it was not possible
22 for him to move his family residence to Yarmouth. He was
23 born and raised in Amherst, and he and his wife had raised
24 their family there as well. His wife cared for her
25 elderly mother who lived in the area and she also had her

1 own business in Amherst which she had carried on for many
2 years.

3 The Appellant also testified that five
4 Southwest workers had stayed temporarily at the apartment
5 in Yarmouth for varying periods of time between 2002 and
6 2005. Two of these were contractors who were involved in
7 the set up of Southwest in 2002 and the rest were
8 employees who subsequently moved to Yarmouth.

9 According to the Appellant, one of these
10 employees was Mr. Ed Raine, the General Manager for
11 Southwest. This evidence contradicted what the auditor
12 from Canada Revenue Agency was told by Mr. Raine, himself,
13 who said that Southwest did not make the apartment
14 available to anyone but the Appellant.

15

16 Appellant's Position

17 At the hearing, the Appellant took issue
18 only with the Minister's determination that the Appellant
19 was the primary beneficiary of the rental of the Yarmouth
20 apartment rather than Southwest. He contends that the
21 rental was primarily connected with Southwest's business,
22 and any benefit that accrued to the Appellant personally
23 was only incidental to the primary benefit to Southwest
24 which was to make the Appellant and his business expertise
25 available to Southwest.

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1 He also likened these expenses to travel
2 expenses incurred in carrying on a business and referred
3 to the case of *Lowe v The Queen*, 1996 FCJ 319. In that
4 case, the Appellant and his spouse went on a trip to
5 New Orleans paid for by the taxpayer's employer. Brokers
6 who sold the employer's life insurance products were
7 awarded expense paid trips to New Orleans by the company
8 that employed the taxpayer, and the taxpayer and his wife
9 were required to accompany the brokers and ensure that
10 they had a good time.

11 The Minister's assessment of the taxable
12 benefit to the taxpayer in that case was struck down on
13 the basis that the Appellant's and his spouse's attendance
14 in New Orleans was required by the employer's business and
15 that they were primarily engaged there in business
16 activities on behalf of the employer.

17 The Appellant said that in this case the
18 Appellant's presence in Yarmouth was required by Southwest
19 and that while there he was primarily engaged in Southwest
20 business.

21 The Appellant also relied upon the decision
22 of the Tax Review Board in *Paul's Hauling Limited and Paul*
23 *E. Albrechtsen v. The Minister of National Revenue*, 1979
24 DTC 167. In that case, the corporate Appellant had
25 provided a furnished apartment in Winnipeg to the

1 individual Appellant, Mr. Albrechtsen, its President and
2 Chief Executive Officer who resided in Calgary. Mr.
3 Albrechtsen was assessed a taxable benefit in respect of
4 the use of the apartment. The Board held that the
5 maintenance of the apartment by the corporate Appellant
6 did not provide an economic benefit to Mr. Albrechtsen.

7 The Court said:

8 "In short, in 1975 Mr. Albrechtsen
9 resided in Calgary. His presence was
10 required in Winnipeg from time to time
11 in connection with the business of
12 Hauling. That business had grown over
13 the years and Mr. Albrechtsen's
14 private office at Oak Point Road had
15 become less and less suitable for use
16 for substantial parts of his work. It
17 was in response to that situation that
18 Hauling rented and furnished the
19 apartment at 200 Tuxedo Boulevard in
20 Winnipeg. The apartment was
21 appropriate for use (a) for overnight
22 accommodation of Mr. Albrechtsen when
23 he was in Winnipeg, (b) for overnight
24 accommodation of business associates
25 of Mr. Albrechtsen, Mr. Penton for

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1 example, and (c) for purposes of
2 office work requiring a tranquil
3 atmosphere.

4 The apartment was, in fact, used for
5 all such purposes."

6 The Appellant submits that many of the same
7 factors are present in this case and I should therefore
8 follow that decision.

9 Respondent's Position

10

11 The Respondent contends that the Appellant,
12 and not Southwest, was the primary beneficiary of the
13 arrangement whereby Southwest paid his accommodation costs
14 in Yarmouth. Alternatively the Respondent suggests that
15 the benefit was a shareholder benefit, taxable under
16 Section 15(1) of the Act.

17 The Respondent said that the benefit met
18 the conditions set out by the Federal Court of Appeal in
19 *McGoldrick v The Queen*, 2004 FCA 189 for taxable benefits
20 under paragraph 6(1)(a). The Court said:

21 "As a general rule any material
22 acquisition in respect of employment
23 which confers an economic benefit on a
24 taxpayer and does not constitute an
25 exemption falls within paragraph

1 6(1)(a), (see R. v. Savage (1983), 83
2 D.T.C. 5409 . . .[W]here something is
3 provided to an employee primarily for
4 the benefit of the employer, it will
5 not be a taxable benefit if any
6 personal enjoyment is merely
7 incidental to the business purpose."

8 The Respondent contends that the economic
9 benefit to the Appellant in this case was that he was not
10 required to pay for accommodation in Yarmouth.

11 The Respondent says that the case of *Paul's*
12 *Hauling Limited et al* is distinguishable on its facts from
13 the case at bar. Firstly, the individual taxpayer in that
14 case only stayed at the Winnipeg apartment from time to
15 time, whereas the Appellant, here, was at the Yarmouth
16 apartment on a regular full-time basis. Secondly, the
17 apartment was also rented and used as an office. Finally,
18 it was also used to put up other business associates.

19 The Respondent also asks that I do not
20 accept the Appellant's evidence that the Yarmouth
21 apartment was used by Southwest Motors to house other
22 workers.

23 The Respondent also relies on the case of
24 *Cockerill v The Queen*, 1965 Tax Appeal Board cases, in
25 which the assessment of a taxable benefit to the taxpayer

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1 was upheld by the Board in respect of accommodation
2 provided to him by his employer. The taxpayer was a U.S.
3 citizen and had a permanent home in Ohio. He was also the
4 President of a corporation in Hull, Quebec. The Board
5 said:

6 The Appellant had to live away from
7 his Ohio home in order to serve the
8 distant company that employed him and
9 had to have other accommodation
10 somewhere. Ottawa was the place
11 selected. The evidence disclosed that
12 he away from Ottawa only 101 days in
13 1958, 84 days in 1959, 84 days in 1960
14 and 97 days in 1961. Hence he was in
15 the vicinity of that municipality much
16 more often than in Ohio and virtually
17 had two residences while he chose to
18 be employed at Hull. He was obliged
19 to live close to what was his main
20 place of employment and the payment of
21 his rent by the Company was a saving
22 to him *pro tanto* in personal or living
23 expenses and clearly a benefit. It is
24 not customary for a corporation to pay
25 a substantial part of an officer's

1 living expenses and when this happens,
2 the officer concerned necessarily
3 benefits accordingly.

4 Lastly, counsel said that a taxable benefit
5 can arise under paragraph 6(1)(a) even where the benefit
6 is provided for a business purpose and the cost of the
7 benefit is deductible to the payor. The question is
8 whether the benefit to the recipient can be said to be
9 merely incidental to the business benefit to the payor.

10

11 Analysis

12 In my view the evidence does not support
13 the Appellant's position that he did not receive a taxable
14 benefit within the ambit of paragraph 6(1)(a) in the
15 circumstances of this case. Southwest paid the
16 Appellant's accommodation expenses while he was performing
17 duties for the corporation at its ordinary place of
18 business on a full-time basis for an indeterminate period
19 of time.

20 These expenses cannot be likened to
21 ordinary travel expenses such as those in *Lowe* because
22 they were not incurred while the Appellant was travelling
23 away from Southwest's place of business in Yarmouth. The
24 travel in this case was necessitated by the choice made by
25 the Appellant to maintain his residence in Amherst and his

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1 choice to work full-time in Yarmouth.

2 In order to make himself available to work
3 for Southwest the Appellant was required either to travel
4 back and forth from his residence in Amherst or to set up
5 another residence in Yarmouth. He chose to do the latter.

6 In *Symes v The Queen*, Justice Iacobucci writing for the
7 majority made the following observation at paragraph 79:

8 ". . .Traditionally expenses that
9 simply make the taxpayer available to
10 the business are not considered
11 business expenses since the taxpayer
12 is expected to be available to the
13 business as a quid pro quo for
14 business income received. . ."

15 In my view, these comments are equally applicable to a
16 situation involving an office or employment.

17 The costs of the Appellant's accommodation
18 in Yarmouth was the result of a personal choice made by
19 the Appellant and not as a result of a business
20 requirement of Southwest. The benefit to the Appellant
21 cannot be said therefore to have been primarily provided
22 for the benefit of Southwest.

23 It is clear that, but for the Appellant's
24 personal connections in Amherst, he would have moved
25 permanently to Yarmouth. It is entirely understandable

1 that the Appellant chose to maintain those connections and
2 his residence in Amherst, but that choice, again, was a
3 personal one.

4 The choice to maintain the Appellant's
5 residence would have led to an increase in the Appellant's
6 living costs had Southwest not paid for his accommodation
7 in Yarmouth, and therefore by freeing the Appellant from
8 those payments, Southwest can be said to have conferred a
9 benefit of economic value upon him.

10 I agree with the Respondent that the
11 decision in *Paul's Hauling Limited et al* can be
12 distinguished from this case on its facts. I do not
13 accept the evidence of the Appellant relating to the use
14 of the apartment by other Southwest workers. As already
15 stated, the evidence directly contradicts the statements
16 of the General Manager of Southwest to the CRA auditor
17 during the audit. The auditor's evidence on this point was
18 unchallenged by the Appellant and none of the other
19 workers were called to testify.

20 No reason was given for not calling the
21 workers to testify and I am entitled to draw an inference
22 that their evidence would not have been favourable to the
23 Appellant on this point.

24 I also do not believe that the Appellant's
25 initial intention to spend only half his time in Yarmouth

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1 has a bearing on the outcome of his appeal. It appears
2 that this intention changed in early 2003 at least with
3 the opening of the subdealership in Digby. I infer from
4 all of the evidence that he devoted all his energies to
5 Southwest business and was in Yarmouth every week in the
6 years in issue on a full-time basis.

7 Even though the decision in *Paul's Hauling*
8 *Limited et al* is distinguishable on its facts, I would
9 also say that, to the extent that it stands for the
10 proposition that the ongoing payment of the living
11 expenses of an officer and employee of a corporation while
12 he or she is working at the corporation's only place of
13 business, is not a taxable benefit its authority is
14 questionable. In that case, the taxpayer's need for
15 accommodation in Winnipeg was determined by his choice of
16 having his residence in Calgary, not by any business
17 requirement of his employer. Once again that choice was
18 personal and any payment made by the corporation that
19 resulted from that choice ought to be seen as primarily
20 benefiting the taxpayer and not the corporation.

21 For all these reasons I find that the
22 accommodation payments in this case were a benefit
23 received by the Appellant that fall within paragraph
24 6(1)(a) of the *Act* and were properly included in his
25 income. It is not necessary therefore to deal with the

1 Respondent's alternative subsection 15(1) argument.

2 Therefore the Appeal is dismissed.

3 (MATTER CONCLUDES)

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CERTIFICATE OF COURT TRANSCRIBER

I, Sandy Adam, Court Transcriber, hereby certify that I have transcribed the foregoing and that it is a true and accurate transcript of the evidence in this matter, **Gordon Cameron**, (Appellant) v. **Her Majesty The Queen** (Respondent), taken by way of electronic recording.

Sandy Adam, 2006-34
Certified Court Reporter

Halifax, Nova Scotia
Wednesday, November 7, 2007