Federal Court of Appeal  Cour d'appel fédérale

Date: 20200515

Docket: A-191-19

Citation: 2020 FCA 89

CORAM: **DAWSON J.A.**
RENNIE J.A.
LOCKE J.A.

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Appellant

and

AL SAUNDERS CONTRACTING & CONSULTING INC.

Respondent

Dealt with in writing without appearance of parties.

Judgment delivered at Ottawa, Ontario, on May 15, 2020.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: RENNIE J.A.
LOCKE J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20200515

Docket: A-191-19

Citation: 2020 FCA 89

CORAM: **DAWSON J.A.**
RENNIE J.A.
LOCKE J.A.

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Appellant

and

AL SAUNDERS CONTRACTING & CONSULTING INC.

Respondent

REASONS FOR JUDGMENT

DAWSON J.A.

[1] Subject to specific, limited exceptions, amounts to be included as income from an office or employment include all amounts received by a taxpayer in a taxation year "as an allowance for personal or living expenses or as an allowance for any other purpose" (paragraph 6(1)(*b*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act)). One exception is found in subparagraph 6(1)(*b*)(vii) of the Act relating to reasonable allowances for travel expenses.

[2] In material part, subparagraph 6(1)(*b*)(vii) reads:

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 :
…	[…]
(*b*) all amounts received by the taxpayer in the year as an allowance for personal or living expenses or as an allowance for any other purpose, except	(*b*) les sommes qu'il a reçues au cours de l'année à titre d'allocations pour frais personnels ou de subsistance ou à titre d'allocations à toute autre fin, sauf :
…	[…]
(vii) reasonable allowances for travel expenses (other than allowances for the use of a motor vehicle) received by an employee … from the employer for travelling away from	(vii) les allocations raisonnables pour frais de déplacement, à l'exception des allocations pour l'usage d'un véhicule à moteur, qu'un employé — dont l'emploi n'est pas lié à la vente de biens ou à la négociation de contrats pour son employeur — a reçues de son employeur pour voyager, dans l'accomplissement des fonctions de sa charge ou de son emploi, à l'extérieur :
(A) the municipality where the employer's establishment at which the employee ordinarily worked or to which the employee ordinarily reported was located, and	(A) de la municipalité où était situé l'établissement de l'employeur dans lequel l'employé travaillait habituellement ou auquel il adressait ordinairement ses rapports,
(B) the metropolitan area, if there is one, where that establishment was located,	(B) en outre, le cas échéant, de la région métropolitaine où était situé cet établissement,
in the performance of the duties of the employee's office or employment,	
(underlining added)	(soulignements ajouté)

[3] Any amount excluded from a taxpayer's income pursuant to subparagraph 6(1)(*b*)(vii) of the Act is also excluded from withholding obligations under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (see section 12) and the *Employment Insurance Act*, S.C. 1996, c. 23 (see *Insurable Earnings and Collection of Premiums Regulations*, SOR/97-33, paragraph 2(3)(*a.1*)).

[4] The respondent is a heavy equipment contracting company that paid wages and allowances to its employees. The Minister of National Revenue determined that allowances paid by the respondent to certain of its employees in the 2013 and 2014 taxation years were pensionable and insurable earnings. The Minister assessed the respondent for Canada Pension Plan contributions and Employment Insurance premiums not deducted and remitted with respect to the allowances.

[5] The respondent appealed these assessments to the Tax Court of Canada.

The decision of the Tax Court

[6] At trial, the respondent acknowledged that the workers who received the allowances were employees in 2013 and 2014. Therefore, to determine whether the allowances were subject to withholding obligations, the Tax Court was required to determine whether the allowances paid were taxable under the Act.

[7] The respondent did not assert that the allowances were reasonable. Rather, counsel for the respondent "provided a table of proposed" reasonable allowances which the Court described as being found at Tab 5 of Exhibit A-1 (reasons, paragraph 42 and 46).

[8] For reasons cited 2019 TCC 86, the Tax Court decided that for the purpose of subparagraph 6(1)(*b*)(vii) of the Act:

i. the allowances called "subsistence allowances" and "trailer allowances" paid by the respondent were properly characterized as being in the nature of travel allowances potentially subject to subparagraph 6(1)(*b*)(vii) (reasons, paragraphs 47 and 56);

ii. the employees who received the allowances travelled away from the municipality where they ordinarily worked in the performance of their duties (reasons, paragraph 49);

iii. some of the allowances were reasonable and so were properly excluded from income; and,

iv. some of the allowances were properly only partially excluded from income.

[9] After finding that the subsistence allowances were travel allowances under subparagraph 6(1)(*b*)(vii), the Tax Court found that:

> [50] Where the number of days worked out of town was provided in the table at Tab 5 of Exhibit A-1, the proposed allowances range from $46.67 per day (Matthew Ingvardsen in 2014) to $92.59 per day (Colin Averill in 2013).
>
> [51] There was no figure provided for out-of-town days worked by Mr. Averill in 2014. However, the calendar and invoices at Tab 3 of Exhibit A-1 show that he

> worked out of town for at least 90 days in 2014. Therefore, the proposed allowance for him in 2014 amounts to approximately $30 per day.
>
> [52] This range of daily amounts is less than or in line with the travel allowance paid by the Government of Canada to its employees in 2013 and 2014. Therefore, I find that the proposed amounts with respect to Mr. Averill, Ms. Borys (McKinnon), and Mr. Ingvardsen are reasonable. No evidence was presented to support the proposed amount with respect to Mr. Bjorkman, so I can only conclude that it is unreasonable.

[10] The Tax Court did not consider the reasonableness of the allowances initially paid. The Court's analysis was confined to considering the reduced allowances set out in Exhibit A-1.

[11] With respect to the "trailer allowances" paid to two employees, after finding that the "trailer allowances" were travel allowances under subparagraph 6(1)(*b*)(vii), the Tax Court found:

> [57] There was no evidence presented to support the reasonableness of a rate of $150 per day, so I accept [the evidence of an "employer compliance auditor" who testified on behalf of the appellant] that $60 per day is a reasonable rate.
>
> [58] Based on the Appellant's ledgers at Exhibit R-4, Mr. French received the trailer allowance for five days in 2013 while Mr. Powder received it for six days that year. Therefore, the allowance amounts to $300 for Mr. French and $360 for Mr. Powder in 2013.

[12] Again, the Tax Court failed to consider the reasonableness of the allowances actually paid to the employees.

[13] These were consolidated appeals from the judgment of the Tax Court. The respondent has not participated in the appeals and has advised, through counsel, that it "neither consents to nor opposes the appeals."

[14] The appeals were set for hearing in Edmonton, Alberta on March 18, 2020. They were adjourned in light of COVID-19. Subsequently, the appellant requested that the appeals be dealt with in writing without the appearance of the parties. Therefore these reasons are based upon the written record. Subsequently, in response to a direction from this Court, the appellant filed a discontinuance of the appeal in respect of the judgment of the Tax Court in respect of the appeal under the *Employment Insurance Act* (Court file A-192-19).

The issue

[15] On the remaining appeal (Court file A-191-19) under the *Canada Pension Plan* the appellant puts in issue only the finding that certain allowances were partially excluded from income pursuant to subparagraph 6(1)(*b*)(vii) of the Act. More particularly, the appellant appeals from the judgment of the Tax Court in respect of "subsistence allowances" paid to three employees and "trailer allowances" paid to two employees.

[16] The following chart summarizes the findings of the Tax Court that are at issue on this appeal:

Employee	**Allowance Type**	**Original Allowance**	**Amount Presented by Respondent at Trial in Exhibit A-1**	**Reasonable Amount Accepted by the Tax Court**
Colin Averill	Subsistence	$18,150	$10,000	$10,000
Tammy Borys (McKinnon)	Subsistence	$15,210	$7,300	$7,300
Matthew Ingvardsen	Subsistence	$15,500	$10,950	$10,950
Ross French	Trailer	$750	N/A	$300
Terrence Powder	Trailer	$900	N/A	$360

[17] The appellant asks that the judgment of the Tax Court be varied so that with respect to the appeal under the *Canada Pension Plan*:

i. in 2013, Colin Averill received the amount of $10,000 as a travel allowance which was an amount properly included as income;

ii. in 2013, Tammy Borys (formerly McKinnon) received the amount of $7,300 as a travel allowance which was an amount properly included as income;

iii. in 2013, Matthew Ingvardsen received the amount of $10,950 as a travel allowance which was an amount properly included as income;

iv. in 2013, Ross French received the amount of $300 as a travel allowance which was an amount properly included as income; and,

v. in 2013 Terrence Powder received the amount of $360 as a travel allowance which was an amount properly included as income.

[18] The issue raised on this appeal turns upon whether the Tax Court erred by severing amounts paid to employees as travel allowances into two parts: a portion that is unreasonable and a portion that is reasonable, so that the reasonable portion may be excluded from employment income under subparagraph 6(1)(*b*)(vii) of the Act. The appellant submits that Parliament amended subparagraph 6(1)(*b*)(vii) in 1991 to make the entire amount paid as a travel allowance either wholly taxable or non-taxable depending upon whether the entire amount is reasonable.

Consideration of the issue

[19] The interpretation of subparagraph 6(1)(*b*)(vii) is a question of law; the Tax Court's interpretation of the provision is reviewable on the standard of correctness.

[20] The provision must be interpreted using a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. The Tax Court did not conduct this analysis in its reasons.

The text

[21] Subparagraph 6(1)(*b*)(vii) provides that "reasonable allowances for travel expenses" may be excluded from the computation of income. It follows in my view from this wording that allowances that are unreasonable are not excluded from income and are intended to be included in the computation of income.

[22] Had Parliament intended otherwise, it could have used language to the effect that allowances for travel expenses need not be included in income to the extent that the allowance is reasonable. An example of the use of this type of language is found in section 67 of the Act, which provides a general limitation on expenses.

[23] Therefore, I take from the grammatical and ordinary sense of the language of subparagraph 6(1)(*b*)(vii) that Parliament intended to exclude from the computation of income allowances for travel expenses when the allowance is reasonable. Allowances that exceed what is reasonable are to be included in their entirety in income.

[24] In my view, this grammatical and ordinary meaning is consistent with, and supported by, the context and purpose of the provision.

The context

[25] The most important contextual factors are the legislative evolution of the provision and paragraph 8(1)(*h*) of the Act.

[26] The Supreme Court has held that the evolution of legislation is part of the entire context in which statutes are to be read (*Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425, at paragraph 28).

[27] Prior to 1991, part (vii) of paragraph 6(1)(*b*) did not refer to "reasonable allowances for travel expenses". Instead, it provided an exemption from inclusion in the calculation of income for "allowances (not in excess of reasonable amounts) for travel expenses" (*Income Tax Act*, R.S., 1952, c. 148, as amended by R.S.C. 1985, 5th Supp., c. 1, s. 6).

[28] The Technical Note issued by the Department of Finance in May 1991 to explain the amendments made then to the Act, including amendments to subparagraphs 6(1)(*b*)(x) and (xi) relating to allowances for the use of a motor vehicle, stated that:

> These [sub]paragraphs are amended to provide that reasonable allowances in respect of travelling expenses and motor vehicle expenses will be excluded in computing the income of an individual from an office or employment. Thus allowances that are not reasonable, rather than only those in excess of a reasonable allowance, may be included in income. In these circumstances, the taxpayer may be entitled to a deduction with respect to travelling expenses under paragraph 8(1)(f) or (h).
>
> (underlining added)

[29] The Technical Notes are a relevant, extrinsic interpretive aid that adds context to the interpretation of subparagraph 6(1)(*b*)(vii). It reflects a policy decision made by Parliament that when an allowance is paid in respect of a travelling expense that is not reasonable, all of the allowance is to be included in the computation of income.

[30] The Technical Note made reference to paragraph 8(1)(*h*) of the Act, a second, related, contextual factor. In circumstances where an allowance is paid in respect of a travelling expense that is not reasonable, for example the allowance is too high, subparagraph 8(1)(*h*)(iii) is intended to provide relief. The provision states that:

8 (1) In computing a taxpayer's income for a taxation year from an office or employment, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto	8 (1) Sont déductibles 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 se rapportent entièrement à cette source de revenus, ou la partie des éléments suivants qu'il est raisonnable de considérer comme s'y rapportant :
…	[…]
(*h*) where the taxpayer, in the year,	*h*) lorsque le contribuable, au cours de l'année, à la fois :
(i) was ordinarily required to carry on the duties of the office or employment away from the employer's place of business or in different places, and	(i) a été habituellement tenu d'exercer les fonctions de son emploi ailleurs qu'au lieu d'affaires de son employeur ou à différents endroits,
(ii) was required under the contract of employment to pay the travel expenses incurred by the taxpayer in the performance of the duties of the office or employment,	(ii) a été tenu, en vertu de son contrat d'emploi, d'acquitter les frais de déplacement qu'il a engagés pour l'accomplissement des fonctions de sa charge ou de son emploi,
amounts expended by the taxpayer in the year (other than motor vehicle expenses) for travelling in the course of the office or employment, except where the taxpayer	les sommes qu'il a dépensées pendant l'année (sauf les frais afférents à un véhicule à moteur) pour se déplacer dans l'exercice des fonctions de son emploi, sauf s'il a, selon le cas :
(iii) received an allowance for travel expenses that was, because of subparagraph 6(1)(*b*)(v), 6(1)(*b*)(vi) or 6(1)(*b*)(vii), not included in computing the taxpayer's income for the year, or	(iii) reçu une allocation pour frais de déplacement qui, par l'effet des sous-alinéas 6(1)*b*)(v), (vi) ou (vii), n'est pas incluse dans le calcul de son revenu pour l'année,
(iv) claims a deduction for the year under paragraph 8(1)(*e*), 8(1)(*f*) or 8(1)(*g*);	(iv) demandé une déduction pour l'année en application des alinéas *e*), *f*) ou *g*);
(underlining added)	(soulignements ajouté)

[31] A similar provision exists in paragraph 8(1)(*h.1*) for motor vehicle travel expenses.

[32] This legislative scheme is described in Interpretation Bulletin IT-522R at paragraph 41 in the following terms:

> If the Department considers that an allowance, which is claimed to be non-taxable under subparagraph 6(1)(b)(v), (vi), (vii) or (vii.1), is unreasonably high, the employee is required to provide vouchers or other acceptable evidence to show that the allowance is not in excess of a reasonable amount. Where the employee is unable to show that the allowance is reasonable, the whole amount of the allowance is included under paragraph 6(1)(b) in computing the employee's income and, if the employee qualifies, an amount may be deducted under paragraph 8(1)(f), (h), (h.1) or (j), depending on the circumstances, as discussed in 31 through 38 above. …
>
> (underlining added)

[33] The deduction permitted by subparagraph 8(1)(*h*)(iii) is premised on an employee not being in receipt of a non-taxable allowance for travel expenses from the employer. If the reasonable portion of an unreasonable travel allowance paid under paragraph 6(1)(*b*) could be excluded from income under subparagraph 6(1)(*b*)(vii), as the Tax Court did, the purpose of subparagraph 8(1)(*h*)(iii) would be defeated.

[34] Thus, the contextual factors support the interpretation reached having regard to the grammatical and ordinary meaning of the text.

The purpose

[35] As for the purpose of the provision, the important purpose of paragraph 6(1)(*b*) is to prevent employers from paying to employees salary disguised as an allowance in order to render the salary tax-free. Subparagraph 6(1)(*b*)(vii) is an exception from this general purpose to be construed so as not to defeat the purpose of the general provision. Construing the exception to

apply only to allowances that are reasonable does not defeat, and furthers, the purpose of paragraph 6(1)(*b*).

Conclusion

[36] Having examined the text, context and purpose of subparagraph 6(1)(*b*)(vii) of the Act, I conclude that the Tax Court erred in law in its interpretation of the provision and erred by failing to consider the reasonableness of the allowances actually paid to the employees. It follows that I would allow the appeal. Pronouncing the judgment that ought to have been pronounced I would refer the assessment made on January 17, 2017 back to the Minister for reassessment in accordance with these reasons.

[37] The appellant does not seek costs in view of the respondent's non-participation in the appeal. Therefore, I would not award costs.

"Eleanor R. Dawson"
J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-191-19
STYLE OF CAUSE:	THE MINISTER OF NATIONAL REVENUE v. AL SAUNDERS CONTRACTING & CONSULTING INC.

APPEAL DEALT WITH IN WRITING WITHOUT APPEARANCE OF THE PARTIES

REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	RENNIE J.A. LOCKE J.A.
DATED:	MAY 15, 2020

WRITTEN REPRESENTATIONS BY:

Valerie Meier Allan Mason	FOR THE APPELLANT

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE APPELLANT
Felesky Flynn LLP Calgary, Alberta	FOR THE RESPONDENT