Docket: 2007-3194(IT)I

BETWEEN:

GILLES BOURGET,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 18 and 19, 2008, at Montréal, Quebec.

Before: The Honourable Justice Gaston Jorré

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	Mounes Ayadi

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2003 and 2004 taxation years is allowed with costs of $80 to the appellant, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment, in accordance with the attached Reasons for Judgment.

It is ordered that the appellant's $100 filing fee be reimbursed.

Signed at Ottawa, Canada, this 16th day of November 2009.

"Gaston Jorré"

Jorré J.

Translation certified true
on this 16th day of December 2009
Margarita Gorbounova, Translator

Citation: 2009 TCC 533
Date: 20091116
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REASONS FOR JUDGMENT

Jorré J.

The facts

[1] The appellant filed an appeal from reassessments concerning the 2003 and 2004 taxation years.

[2] In making the reassessments, the Minister made the following changes to the appellant's income:

(a) In 2004, he added $5,000, which was received that year, at the end of the appellant's employment contract with Entreprises Pesamiu Ilnuts inc. (the employer). The Minister assumed that the $5,000 was severance pay.
(b) He added standby charges for an automobile in the amount of $4,704 in 2003 and of $2,352 in 2004.
(c) He added $2,688 in 2003 and $1,428 in 2004 as an automobile operating expense benefit.

[3] The appellant is challenging the addition of those amounts to his income. According to the appellant, those amounts should not be added to his income because he should be entitled to the exemption set out in subsection 6(6) of the *Income Tax*

Act (ITA). First, he is claiming that the amount of $5,000 was used for his board and lodging and should therefore be exempt under paragraph 6(6)(*a*). Second, according to the appellant, paragraph 6(6)(*b*) would exempt the automobile benefit.

[4] For the reasons that follow, the appeal will be allowed in part.

[5] The appellant worked for the employer from September 2001 to November 2004. He held an administrative position and was, among other things, in charge of accounting.

[6] At the start of his job, he lived in Baie-Comeau for two or three months. After that, he rented a place in Ragueneau, which was closer to his work in Betsiamites. That place was 12 or 13 km away from his work, while Baie-Comeau was 45 km away.

[7] The appellant's employer had obtained a contract concerning the construction of the Toulnustouc Hydroelectric Dam. The contract was expected to be for four years. The appellant was hired in relation to that project.

[8] The employer decided that the accounting for the project would be done at the company headquarters in Betsiamites, not at the site of the Toulnustouc Dam.

[9] Originally, the job was for about a one-year period during which the employer's work camp would be constructed near the dam site.[1] The job could be for a maximum of four years, that is, the duration of the employer's contract for constructing the dam. In June 2002, the appellant's contract of employment was renewed. The job in question lasted about three years.

[10] The appellant proposed that he be paid a $300-per-week living allowance, and the employer ended up paying him a $250 allowance. That $250 per week was paid to the appellant from February 8, 2002, until the end of his contract.[2]

[11] However, given the appellant's costs, the appellant and the employer continued to discuss raising the allowance. According to the appellant, the employer finally agreed to adjust the amount at the end of the contract, and the $5,000 payment in question was a retroactive increase of the allowance.

[12] However, in cross-examination, when the appellant saw his expense account dated October 21, 2004, he agreed that only $2,500 of the total amount of $5,000

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[1] Transcript from February 19, 2008, questions 6 and 18, see also Exhibit A-1.

[2] The $250 per week paid during the employment is not at issue. The appellant did not include the $250 allowance in his income, and the Minister did not include it in the reassessments.

constituted an adjustment to the allowance. According to the expense account, the second half of the $5,000 represented the cost of relocating to Montréal. Relocation costs cannot be a living allowance.

[13] Throughout the entire period at issue, the appellant had at his disposal a residence in Anjou, Quebec.

Analysis

[14] The appellant claims that if the employer had not decided to do the accounting at the company's headquarters in Betsiamites, but rather had it done at the construction site of the Toulnustouc Dam, which was the logical place to do it, there would be no doubt that subsection 6(6) applies to his situation, as was the case for the employees at the dam site, who received a benefit or an allowance for their board and lodging. The appellant finds the fact that he did not benefit from the provisions in subsection 6(6) to be discriminatory in comparison with the other employees at the dam site.

[15] Subsection 6(6) of the ITA reads as follows:

> (6) **Employment at special work site or remote location** – Notwithstanding subsection 6(1), in computing the income of a taxpayer for a taxation year from an office or employment, there shall not be included any amount received or enjoyed by the taxpayer in respect of, in the course or by virtue of the office or employment that is the value of, or an allowance (not in excess of a reasonable amount) in respect of expenses the taxpayer has incurred for,
>
> (*a*) the taxpayer's board and lodging for a period at
>
> (i) a special work site, being a location at which the duties performed by the taxpayer were of a temporary nature, if the taxpayer maintained at another location a self-contained domestic establishment as the taxpayer's principal place of residence
>
> (A) that was, throughout the period, available for the taxpayer's occupancy and not rented by the taxpayer to any other person, and
>
> (B) to which, by reason of distance, the taxpayer could not reasonably be expected to have returned daily from the special work site, or
>
> (ii) a location at which, by virtue of its remoteness from any established community, the taxpayer could not reasonably be expected to establish and maintain a self-contained domestic establishment,
>
> if the period during which the taxpayer was required by the taxpayer's duties to be away from the taxpayer's principal place of residence, or to be at the special work site or location, was not less than 36 hours; or
>
> (*b*) transportation between

> (i) the principal place of residence and the special work site referred to in subparagraph 6(6)(*a*)(i), or
>
> (ii) the location referred to in subparagraph 6(6)(*a*)(ii) and a location in Canada or a location in the country in which the taxpayer is employed,
>
> in respect of a period described in paragraph 6(6)(*a*) during which the taxpayer received board and lodging, or a reasonable allowance in respect of board and lodging, from the taxpayer's employer.

[16] For subsection 6(6) to apply, the appellant must fulfill several conditions. First, the place of work must be

(a) at a special work site or
(b) at a remote location, that is, at a location at which, by virtue of its remoteness from any established community, the appellant could not reasonably be expected to establish and maintain a self-contained domestic establishment.

[17] Although there were no lodgings in Betsiamites proper, the appellant was able to rent a lodging in Ragueneau, which was 12 or 13 km away from his job. Betsiamites is at least 60 km away from Baie-Comeau, and Ragueneau is 45 km from Baie-Comeau.

[18] The appellant had a self-contained domestic establishment, and his job was not at a remote location within the meaning of subparagraph 6(6)(*a*)(ii) of the ITA.

Was it a special work site?

[19] In *Alain Guilbert v. M.N.R.*, [1991] T.C.J. 127 (QL), Judge Dussault wrote the following:

> The principle set out in paragraph 6(1)(*a*) of the Act is that there shall be included in computing the income of a taxpayer "the value of board, *lodging* and other benefits of any kind whatever received or *enjoyed by him in the year* in respect of, in the course of, or by virtue of an office or employment, ...".
>
> On the other hand, subsection 6(6) of the Act provides an exception to this principle of including the value of benefits in income from an office or employment, in the case of employment at a special work site or at a remote location. The part of subsection 6(6) of the Act which is relevant to this case . . . .
>
> Since 1985, paragraph (*a*) has read:
>
> > (*a*) his board and lodging for a period at

> (i) a special work site, being a location at which the duties performed by him were of a temporary nature, if he maintained at another location a self-contained domestic establishment as his principal place of residence
>
> (A) that was, throughout the period, available for his occupancy and not rented by him to any other person, and
>
> (B) to which, by reason of distance, he could not reasonably be expected to have returned daily from the special work site, ...

Essentially, the appellant argues that during the years in question his work in Québec City was "of a temporary nature", his place of work at Le Soleil must be considered to be analogous to a "special work site" and he always maintained his principal place of residence in Domaine Cherbourg, in Orford township in the Eastern Townships.

Counsel for the respondent argued that the appellant's work for Le Soleil was of a permanent nature, the newspaper's premises were not a "special work site" and the appellant's principal place of residence was in the Jardins Merici in Québec City, in the apartment provided by Le Soleil.

With respect to the meaning of the word "chantier" ["work site"], counsel for the respondent referred to the usual meaning as found, inter alia, in the Petit Robert, which defines it as follows, using its modern meaning in context:

> Lieu ou sont entassés materiaux. V. Atelier, entrepôt. *Chantier de construction; de démolition. Travailler sur un chantier. Chantier d'exploitation. d'abattage d'une mine. - Chantier naval, Ancienn.* Au Canada, Exploitation forestière. - Habitation pour les bûcherons dans la forêt. *Homme de chantier (Pop).* Ouvrier forestier. V. Bûcheron. *Faire chantier*: abattre et acier des arbres.

(Translation)

> Place where materials are stockpiled. See Shop, warehouse. *Construction site: demolition site. Work on a site. Mine workings. - Shipyard. Archaic.* In Canada, Forestry. - Lodging for lumberjacks in the forest. *"Homme de chantier" (Pop).* Forestry worker. See Lumberjack. *"Faire chantier"*: cut down and saw trees.

Counsel for the respondent also submits that in the context of the tax reform that applied starting in 1972 the scope of the earlier provision, which applied only to construction workers working on remote sites, was considerably broadened, and on this point referred to the Summary of 1971 Tax Reform Legislation, The Honourable E.J. Benson, Minister of Finance, *Summary of 1971 Tax Reform Legislation*, page 10, and particularly to the following paragraphs:

> Away from home expenses
>
> Under existing law, construction workers at distant work sites may receive tax-free from their employers amounts covering expenses of transportation, board and lodging. The bill extends this to all employees.
>
> The revision recognizes that many people besides construction workers must leave their normal residence and live and work temporarily at a place where they cannot reasonably be expected to establish homes for their wives and families.
>
> The provision will apply, as it does now, only to an employee who leaves his ordinary residence. It will not apply to a single individual who does not maintain a

> permanent residence in which he supports a dependant. It is necessary that the employee be away from his ordinary residence for at least 36 hours and the work site must be far enough away that he could not reasonably be expected to return home daily.
>
> Among those who will benefit are lumber and mining workers, oil well drillers, exploration crews, employees at isolated bases and those who work at remote construction sites but do not qualify as "construction workers".

The Act is indeed complex, and contains numerous definitions. However, we cannot assume, in the absence of a special statutory definition, that the usual words used by Parliament must have a meaning different from the generally recognized meaning set out in current dictionaries. A "work site" is a "work site" and this expression cannot refer to just any place of work. The newspaper's premises are not, in my humble opinion, a work site, or a "special work site", within the meaning intended by Parliament. By analogy, we could refer to the decision in *Graham L. Harle. M.L.A.. and Calvin E. Lee. M.L.A. v. M.N.R.*, 76 DTC 1151, cited by counsel for the respondent, which refused to recognize that provincial legislative buildings were "a special worksite", or in French, "un chantier particulier",

I will further add that a careful reading of paragraph 6(6)(*a*) of the Act indicates that expenses for board and lodging must have been incurred "at a special work site", [In French, the expression used is "sur un chantier particulier".]. It provides for the situations in which there are at the work site or at least in the relatively immediate vicinity, appropriate premises for employees' board and lodging, situations which are completely different from the one we must decide here.

[20] I agree with Judge Dussault that a "special work site" cannot be equivalent to any "place of work". By choosing the words "special work site" in English and "chantier particulier" in French, Parliament wanted to restrict the scope of the exemption.

[21] Regardless of the scope of the meaning of the words "special work site", it does not include the appellant's employer's headquarters in Betsiamites.[3]

[22] Consequently, it cannot be a special work site, and the exemption in subsection 6(6) does not apply.[4]

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[3] I also agree with Judge Dussault that the exemption in subparagraph 6(6)(*a*)(i) applies only if the person has lodgings in the vicinity of the special work site. In this case, the evidence indicates that around 150 km separated Betsiamites from the Toulnustouc Dam.

[4] Given my finding on the issue of the "special work site", it is not necessary to decide whether the work was of a temporary nature.

In making this finding, I was aware of the decisions in *Jaffar v. Canada*, [2002] T.C.J. No. 67 (QL), and *Rozumiak v. The Queen*, 2005 TCC 811. In those two decisions, "special work site" is given a broader interpretation. Those two decisions do not change my finding for two reasons.

First, neither of the two decisions applies to the situation at issue in this case, where the appellant worked at the employer's headquarters, since, if I understand correctly, those two decisions deal with a "special work site" where it means "unusual or exceptional place" – in *Jaffar* because the appellant went to work at a client's office at his employer's

[23] Parliament made a distinction between workers at a special work site and those who, like the appellant in this case, work elsewhere; it is a choice that Parliament can make.

Calculation of a reasonable standby charge for an automobile

[24] Before closing, I must examine the calculation of a reasonable standby charge. In her testimony, Marie-Cécile Partel of the Canada Revenue Agency explained that, as shown in Exhibit I-2, an automobile operating expense benefit was calculated and that the reasonable cost was based on an automobile rental fee of $700 per month. She explained that the amount of $700 was prescribed by subsection 7307(3) of the *Income Tax Regulations*.[5]

[25] However, that subsection sets the maximum amounts under section 67.3 of the ITA. It does not apply to paragraph 6(1)(*e*) or to subsection 6(2) of the ITA, which pertain to a reasonable standby charge for an automobile. We must determine the rental fee for the purposes the calculation under subsection 6(2), particularly, item E of the formula.

[26] I accept the appellant's testimony, in which he reveals rather different facts with respect to the automobile.

[27] First, although the appellant agreed that, at the start of his employment, renting the vehicle cost around $700 per month, the rent was later renegotiated down to $650 per month.[6] I am satisfied that that renegotiation took place before January 1, 2003. The automobile was rented for a short term.

[28] Second, in April 2003, in order to reduce the costs, the employer purchased a vehicle for $13,500. That vehicle was the appellant's automobile until the end of his employment.[7]

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request (see paragraphs 9 and 13), and in *Rozumiak*, because the appellant worked alone in an office leased by his employer in Chicago, far from Vancouver, where his employer performed its usual activities.

Second, regrettably and with respect, I cannot share the approach at paragraphs 9 to 11 of *Jaffar* concerning the interpretation of bilingual legislation. If I understand that approach correctly, the meaning of the ITA can be interpreted differently depending on whether one is applying the English or the French text. My understanding of the rules of bilingual interpretation is that we must first try to find one meaning common to both texts: *R. v. Daoust*, 2004 SCC 6, paragraphs 26 to 31; see also The Honourable Mr. Justice Michel Bastarache, Naiomi Metallic, Regan Morris and Christopher Essert, *The Law of Bilingual Interpretation*, 1st edition, 2008, Chapter 1.

[5] Transcript from February 19, 2008, questions 78 and 82.

[6] Transcript from February 18, 2008, questions 108 and 111.

[7] *Ibid.*, questions 111 and 112. At the end of question 111, the appellant said that the vehicle was used for about a year and spoke of a purchase in 2003. I believe there was an error in question 112, where the appellant spoke of 2004, which would mean that he would have had the car for only six or seven months if we take into account the end-of-employment date. As a result, I concluded that the vehicle was bought in April 2003.

[29] Consequently, the reasonable standby charge must be recalculated by substituting the rental fee of $650 for three months in 2003 and taking into account the use of a vehicle purchased for $13,500 for nine months. In addition, the calculation for 2004 must be redone taking the purchased vehicle into consideration.[8] The result is that the standby charges should be $2,713.12 in 2003 and $1,360.80 in 2004 instead of $4,704 and $2,352 respectively.

Conclusion

[30] Accordingly, the appeal is allowed, and the case is referred back to the Minister for reconsideration and reassessment on the basis that

(a) for 2003, the reasonable standby charge for the automobile must be $2,713.12 instead of $4,704;
(b) for 2004, the reasonable standby charge for an automobile must be $1,360.80 instead of $2,352.

[8] Item F must also be taken into account in the formula in subsection 6(2) of the ITA.

F is the part of the amount determined for E that may reasonably be regarded as having been payable to the lessor in respect of all or part of the cost to the lessor of insuring against
(a) loss of, or damage to, the automobile, or
(b) liability resulting from the use or operation of the automobile.

It is well known that in a short-tem rental, the insurance in item F(*a*) is very costly. A reasonable amount for item F would be $250 per month.

Thus, for 2003, instead of [$700 x (2/3) x (16,800/20,000) x (365/30)], the calculation will be [$(650 - 250) x (2/3) x (16,800/20,000) x (90/30)] + [(16,800/20,000) x (2/100) x $13,500 x (270/30) = $2,713.12], and for 2004, instead of [$700 x (2/3) x (8,400/10,000) x (180/30)], the calculation will be [$13,500 x (8,400/10,000) x (2/100) x (180/30) = $1,360.80].

Signed at Ottawa, Canada, this 16th day of November 2009.

"Gaston Jorré"

Jorré J.

Translation certified true
on this 16th day of December 2009
Margarita Gorbounova, Translator

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APPEARANCES:

For the appellant:	The appellant himself
Counsel for the respondent:	Mounes Ayadi

SOLICITORS OF RECORD:

For the appellant:	
Name:	
Firm:	
For the respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada