

Docket: 2004-541(IT)G

BETWEEN:

TRANSPORT BAIE-COMEAU INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on August 29, 2005, at Baie-Comeau, Quebec.
Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant: Jean Nadeau

Counsel for the Respondent: Nadine Dupuis

JUDGMENT

The appeal from the assessments under the *Income Tax Act* for the 1999 and 2000 taxation years is allowed, with costs to the Appellant, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the allowances of \$0.03 and \$0.04 per kilometre that the Appellant paid its truck drivers is a lodging allowance, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 6th day of April 2006.

"Alain Tardif"

Tardif J.

Translation certified true
on this 15th day of December 2006
Monica F. Chamberlain, Translator

Citation: 2006TCC108
Date: 20060406
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REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal concerning the 1999 and 2000 taxation years. The issue is whether or not the expenses of \$103,632.63 claimed in 1999 and \$121,395.14 claimed in 2000 as lodging allowances are amounts paid for lodging.

[2] The assessments under appeal were made following an administrative change, and one important aspect of that change was the way in which certain truck drivers, specifically drivers responsible for medium and long-distance transports, were remunerated.

[3] Initially, until 1999, the Appellant's drivers were paid an hourly rate. Expenses for meals and overnight stays were reimbursed upon submission of bills. Most of the reimbursements were for meals.

[4] In 1999, after transport regulation was tightened to impose better controls for greater highway safety, the Appellant, in collaboration with employee representatives, initiated various measures to present the best possible record to the authorities in this area and reduce the prohibitive management costs associated with the reimbursement of truck drivers' expenses.

[5] Thus, in addition to certain corrective measures involving the mechanics of trucks, and in particular their brakes and speed, the Appellant, following consultations and negotiations with its drivers, dropped the hourly remuneration formula and opted for remuneration based on the number of kilometres driven.

[6] At the same time, the drivers agreed that the Appellant would no longer reimburse meal and lodging costs. Instead of the old system, the Appellant began to pay a lodging allowance of \$0.04 per kilometre for drivers who did long-distance trips and \$0.03 per kilometre for those who did medium-distance trips.

[7] When the new payment method came into effect, the drivers, apart from their remuneration based on kilometres driven, received only this \$0.04 per kilometre lodging allowance, and the Appellant ceased to reimburse expenses incurred by the drivers for meals, hotel rooms, showers and so forth.

[8] The Respondent argues that this is an inadequate and perhaps even deceptive description, the only purpose of which was to avoid the allowance being described as a meal allowance, which receives less favourable tax treatment.

[9] For its part, the Appellant claims to have implemented this new method essentially to simplify management and reduce the excessive audit and control costs of the old method, under which drivers were reimbursed upon submission of vouchers.

[10] The Appellant also explained that it consulted the drivers and came to this conclusion with their consent in order to provide them with better working conditions by enabling them to lie down and obtain the benefits of restorative sleep, which is essential to highway safety.

[11] The evidence consisted of the testimony of several drivers, namely Yvan Bouchard, Nelson Ouellet and Jocelyn Barrière for the Appellant, and two of the Appellant's ex-drivers, Yvan Aubert and Sylvain Couturier, for the Respondent. Everyone was or had been a long-distance driver, and had generally driven trucks equipped with a sleeper berth.

[12] They all acknowledged that prior to 1999, the cost of their meals was reimbursed upon submission of vouchers. With the exception of one driver, the

witnesses said that they used a cooler to transport their food: restaurant meals were the exception to the rule, which was to eat the food they brought in their cooler.

[13] All three drivers who testified at the Appellant's request said that their truck, which was equipped with a sleeper berth, offered little or no comfort because the space was very limited, so they essentially used it for very short periods to tide them over.

[14] As for Messrs. Aubert and Couturier, they said that the drivers essentially slept in the sleeper berths, and that nights in hotels or motels were the exception and would occur in the event of a breakdown, for example. However, one of them stated that he would sleep in a hotel or motel in Québec when his girlfriend was living there.

[15] The Respondent, for her part, summoned Daniel Riverain, the person responsible for auditing the Appellant's file, to testify. During the audit, he noticed that the Appellant reimbursed the meal expenses of drivers on long and medium-distance trips before the various changes described above.

[16] Meal expenses were reimbursed upon submission of vouchers. According to Mr. Riverain, hotel or motel costs were also reimbursed on submission of vouchers.

[17] Having noticed that reimbursements for hotel stays were infrequent, he determined that the allowance paid to drivers as a lodging allowance was actually a meal allowance that was being disguised as a lodging allowance in order to benefit from more favourable tax treatment. The assessment that gave rise to this appeal is based on his interpretation.

[18] The Appellant, for its part, submitted that it was mainly a lodging allowance used by drivers for lodging, and that the drivers had exclusive control over how it was spent.

[19] The drivers who used to work for the Appellant and testified for the Respondent said that they used the allowance paid by the Appellant in the performance of their work. One driver said that he sometimes used the allowance for showers, the price of which varied from nil to \$10 depending on the location.

[20] The following questions arise:

- What is a lodging allowance?
- To which expenses does a lodging allowance apply?
- Must the amount of the lodging allowance be reasonable?
- Is it essential that the allowance be spent for a precise purpose? May the recipient of a lodging allowance dispose of it as he sees fit?
- Are there criteria for allocating a lodging allowance?

[21] I should state from the outset that I do not find the amount of the allowance, \$0.03 and \$0.04 per kilometre, excessive. In fact, it is completely reasonable.

[22] The following concrete example is an excellent illustration of this:

A truck driver who drives at 100 km/h for 12 hours is entitled to a \$48 allowance for driving 1200 km. If the distance travelled is 800 km, which might be justified by a variety of unforeseen events, he is entitled to \$32.

Since drivers were entitled to no other reimbursement for their expenses, the \$48 allowance was the only allowance paid in connection with their work as drivers.

[23] My initial reflex was to check the meaning of "lodging allowance". In other words, does a lodging allowance only cover the cost of a hotel or motel room?

[24] Unfortunately, the term "lodging allowance" is not clearly defined in the Act or in the case law. We must therefore consult various dictionaries for a first indication of the meaning of a lodging allowance.

[25] Since the issue is whether the allowance can be used for meals, lodging or both, we must ask whether an initial distinction must be drawn between a lodging allowance and a meal allowance.

[26] The online edition of the Office québécois de la langue française's *Grand dictionnaire terminologique*¹ states that an "*allocation de repas*" is equivalent to an "allowance for board" and that an "*allocation d'hébergement*", synonymous with "*allocation de logement*", is translated as "allowance for room".

[27] The *Petit Robert*² defines the term "*hébergement*" as the act of lodging. *Words and Phrases – Legal Maxims*,³ states that the words "board" and "lodging" mean "food" and "shelter" respectively.

[28] In light of the works consulted, the word "lodging" means and concerns the fact of being lodged or obtaining lodging, thereby excluding the question of meals altogether.

[29] As for the word "allowance", the case law, notably *Gagnon v The Queen*, [1986] 1 S.C.R. 264, lists its defining characteristics:

- The amount must be limited and determined in advance.
- The amount must be paid to enable the recipient to provide for a certain type of expense.
- The amount must be at the complete disposition of the recipient who is not required to account for it to anyone.

[30] Apart from these different characteristics based on which the meaning or scope of a lodging allowance can be defined, I believe it is important to recall that there are several types of allowance. In other words, the existing vocabulary provides us with a very precise description that leaves no room for ambiguity as to its content, and this can be achieved using the common meanings of words. Thus, it is reckless, or at any rate very audacious, to claim that an allowance encompasses several expenses, since there is, in principle, one allowance for each type of expense that can arise in the performance of work.

¹ <http://www.oqlf.gouv.qc.ca/ressources/gdt.html>, consulted on September 20, 2005.

² *Le Nouveau Petit Robert* (1991) under "*hébergement*".

³ J.D. GARDNER & K. M. GARDNER, *Words and Phrases – Legal Maxims*, 49th Cumulative Supplement, vol. 1, A to C (Scarborough: Carswell, 2004), at page B-43.

[31] To illustrate this, I refer to certain judgments that identify different types of allowance. For example, there is a meal allowance, a fuel allowance and a lodging allowance.⁴ Other cases have identified a travel allowance, a room allowance and a meal (board) allowance.⁵

[32] A similar analysis is found in *Caron v. The Queen*, No. 96-3687(IT)I, November 27, 1997, [1998] 3 C.T.C. 2720 (T.C.C.). There, an employee received a travel allowance but got no allowance for meals or lodging. He therefore claimed a deduction for meals and lodging.

[33] Drawing a distinction between travel, meal and lodging expenses, the judge stated, at paragraph 27: "Accommodation expenses are not defined as such in the Act except through the definition of "travelling expenses" in paragraph 8(1)(h), which excludes motor vehicle expenses."

[34] After disallowing meal expenses, Tremblay J. accepted lodging expenses, citing, at paragraph 31, *Johns-Manville Inc. v. Her Majesty the Queen*, [1985] 2 S.C.R. 46, where Estey J. stated as follows:

On the other hand, if the interpretation of a taxation statute is unclear, and one reasonable interpretation leads to a deduction to the credit of a taxpayer and the other leaves the taxpayer with no relief from clearly *bona fide* expenditures in the course of his business activities, the general rules of interpretation of taxing statutes would direct the tribunal to the former interpretation.

[35] In light of all this guidance, it appears that the lodging allowance is very specific and does not include meals or other expenses.

[36] Lastly, in a 1998 memo from the Canada Customs and Revenue Agency (CCRA), memo No. 9802137, published in the May 1998 issue of *Tax Window Files*, the Agency stated:

As you have noted, we have previously indicated that the reasonableness of an allowance is a question of fact. It must be related to the amount of actual expense an individual is likely to incur in respect of the expenses for which the allowance is provided rather than being based on other factors such as levels of salary.

⁴ 9098-5326 *Québec Inc. c. Canada*, No. 2003-1476(EI), June 1, 2004, 2004 TCC 228, at paragraph 3.

⁵ *Skylink Aviation Inc. v. Canada*, No. 2000-2935(EI), April 4, 2001, [2001] T.C.J. No. 223 (QL), at paragraph 8; *Munroe v. M.N.R.*, No. 92-360(IT), April 28, 1992, [1992] T.C.J. No. 281 (QL).

In our view, if in fact all other conditions of paragraph 6(6)(a)(i) are met, the allowance which is based on an estimate of the costs of such board and lodging in the surrounding area would be considered reasonable and therefore non-taxable regardless of the amount actually spent by the employee.

[37] In this regard, everyone said that they did not take advantage of or derive a benefit from this allowance. Daniel Riverain noticed that hotel or motel expenses had been reimbursed. Having noticed that such outlays were less frequent than meal expenses, he totally ignored the lodging component and concluded that it was essentially a meal allowance, adding that the Appellant tended to take shortcuts as far as tax was concerned.

[38] The evidence adduced by the Respondent is essentially premised on the interpretation of an approach that existed with the advent of the numerous changes. It is true that the Appellant could have called all its long-distance drivers as witnesses and asked them what use was made of the lodging allowance they were paid, as opposed to the amount spent or used on meals, and this is the criticism made by the Respondent.

[39] Without supporting documents, such as official receipts, this approach undoubtedly cannot not have been conclusive.

[40] As for the Respondent, she could have established the amounts of the meal and lodging expenses and the proportion that each type of expense accounted for. Here again, the reliability of such data would have been limited, because the company's approach completely changed.

[41] Since we know that meal allowances were reimbursed upon submission of vouchers, it is obvious that the drivers took advantage of it rather than eating sandwiches and frozen meals brought with them in their coolers.

[42] In other words, human beings tend to take advantage of that which is free. Consequently, as soon as the cost of meals ceased to be reimbursed, the drivers obviously resorted to coolers. This approach saved both money and time, especially since the drivers were paid by the kilometre and not by the hour once the changes were made.

[43] In order to dispose of this appeal, I must take into account the facts that existed during the period covered by the assessment. That which might have been done beforehand is not a determinative element, especially since certain changes may have had an impact in several areas. Here, the fact is that the method for reimbursing expenses underwent profound changes through the implementation of an "allowance" approach which superseded a "reimbursement upon submission of vouchers" approach.

[44] Another inescapable fact is that the drivers affected by the allowance were the drivers responsible for long-distance and medium-distance transports. The evidence established that the trucks used for these types of transport were equipped with cramped sleeper berths that offered little or no comfort.

[45] Given the duration and distance of the trips that had to be driven in order to be entitled to the allowance, the drivers absolutely had to sleep away from the area in which they lived, namely the area around Baie-Comeau.

[46] Since the drivers were forced or obliged to sleep away from their area, it is just as clear that they had to eat meals away from home. Did they eat frozen meals, meals prepared from food transported in a cooler, or restaurant meals? The only certain thing is that the drivers concerned had to eat and sleep away from home.

[47] Did they always, rarely or never sleep in the berths with which the trucks that they drove were equipped? It is important to remember that the issue concerns an allowance, which, by definition, is a predetermined amount that is placed at the disposition of the recipient, without the latter having to account for it.

[48] Parliament has provided that, subject to certain terms and conditions, a business may grant its employees an allowance, the obvious purpose of which is to simplify or facilitate the management of expenses incurred by those employees in the performance of their duties.

[49] Where there are patent abuses, the CCRA can and properly does question these allowances. In the instant case, I do not believe that there have been abuses or even excesses. The fact pattern or example discussed in the preceding pages demonstrates that the allowance was completely reasonable.

[50] A lodging allowance certainly cannot encompass or include the cost of meals, both by reason of its ordinary meaning and by reason of the definitions contained in the various dictionaries. Moreover, there are various types of allowances, and this enables interested parties to characterize their allowance in a way that is consistent with reality.

[51] However, an allowance is, by definition, an amount over which the recipient has discretion in the sense that he need not account to anyone. Parliament has specifically provided for two types of allowance that apply to two kinds of expenses, thereby avoiding any confusion.

[52] In the case at bar, the Appellant had the burden of proof. In the context of the numerous and significant changes that it implemented to improve management, one of the things that the Appellant did was to grant some of its drivers an allowance.

[53] This Court has no reason to reject the explanations provided in relation to the allowance in issue. Former practices that pre-date the changes are not determinative; all business owners have the right to change the way they manage their business at any time.

[54] It has been established, on a balance of probabilities, that the Appellant made completely legitimate changes. Following these changes, the drivers were no longer entitled to be reimbursed for their meals upon submission of a bill because the Appellant decided, with their consent, to pay them a lodging allowance that was completely justified and justifiable given the circumstances. As a result of this fact, the drivers entitled to the allowance were relatively free to spend it as they wished and had no vouchers to submit. The fact that certain drivers occasionally or even always ate at restaurants is irrelevant. Such expenditures are not reimbursed and are made with the drivers' own money.

[55] Whether the money used on meals comes from the lodging allowance, their mileage pay, or even their savings is unimportant and there is no need to inquire into the subject. Indeed, one of the purposes of the allowance is not to have to account to anyone.

[56] Consequently, I find that the allowance paid by the Appellant to certain categories of its drivers met the requirements of a lodging allowance.

[57] The appeal is therefore allowed, with costs to the Appellant; the assessments of April 23, 2002, are set aside; and the matter shall be referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the allowances of \$0.03 and \$0.04 per kilometre constitute amounts paid as a lodging allowance.

Signed at Ottawa, Canada, this 6th day of April 2006.

"Alain Tardif"

Tardif J.

Translation certified true
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Monica F. Chamberlain, Translator

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v. Her Majesty the Queen

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REASONS FOR JUDGMENT BY: The Honourable Justice Alain Tardif

DATE OF JUDGMENT: April 6, 2006

APPEARANCES:

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